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In the Supreme Court of the United States

OCTOBER TERM, 1993

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
PETITIONER

v.

GREENWICH COLLIERIES

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
PETITIONER

v.

MAHER TERMINALS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

In adjudicating benefits and claims under the Longshore and Harbor Workers' Compensation Act and the Black Lung Benefits Act, the Department of Labor has long applied a "true doubt" rule, under which doubts on factual issues are resolved in favor of a claimant when the evidence is otherwise in equipoise. The question in these cases is whether use of the "true doubt" rule contravenes the Department's own regulations or Section 7(c) of the Administrative Procedure Act.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the captions, Andrew Ondecko was the claimant and a party to the proceedings below in *Greenwich Collieries*, and Pasqualina Santoro was the claimant and a party to the proceedings in *Maher Terminals*. Mrs. Santoro has filed a separate petition for a writ of certiorari, No. 93-474; Maher Terminals, Inc. has filed a cross-petition for a writ of certiorari in that case, No. 93-666.

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MAHER TERMINALS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Director of the Office of Workers' Compensation Programs of the Department of Labor, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Third Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals in *Greenwich Collieries* v. *Director, Office of Workers' Compensation Programs* (App., *infra*, 1a-16a) is reported at 990 F.2d

730. The decision of the Benefits Review Board in that case (App., *infra*, 17a-23a) is unreported, as is the decision of the administrative law judge (App., *infra*, 24a-46a).

The opinion of the court of appeals in *Maher Terminals, Inc.* v. *Director, Office of Workers' Compensation Programs* (93-474 Pet. App. A1-A16)[1] is reported at 992 F.2d 1277. The decision of the Benefits Review Board in that case (93-474 Pet. App. A17-A25) is unreported, as are the decisions of the administrative law judge (93-474 Pet. App. A26-A46).

JURISDICTION

The court of appeals entered its judgment in *Greenwich Collieries* on March 23, 1993, and in *Maher Terminals* on April 19, 1993. The court denied petitions for rehearing in both cases on June 25, 1993. App., *infra*, 47a-50a. On September 15, 1993, and October 18, 1993, Justice Souter extended the time for filing a petition for a writ of certiorari in both cases, first to October 25, 1993, and then to November 10, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d), provides in part:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

[1] "93-474 Pet. App." refers to the appendix to the petition for a writ of certiorari in *Santoro* v. *Maher Terminals, Inc.*, No. 93-474, which seeks review of the same decision of the court of appeals.

2. Pertinent provisions of the Department of Labor's regulations implementing the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, provide as follows:

20 C.F.R. 718.3(c) provides:

> In enacting [the Black Lung Benefits] Act, Congress intended that claimants be given the benefit of all reasonable doubt as to the existence of total or partial disability or death due to pneumoconiosis. This part shall be construed and applied in that spirit and is designed to reflect that intent. However, no claim shall be approved unless the record considered as a whole, in light of any applicable presumptions, provides a reasonable basis for determining that the criteria for eligibility under the Act and this part have been met.

20 C.F.R. 718.403 provides:

> Except as provided in this subchapter, the burden of proving a fact alleged in connection with any provision of this part shall rest with the party making such allegation.

20 C.F.R. 725.452(a) provides in pertinent part:

> Except as otherwise provided by this part, all hearings shall be conducted in accordance with the provisions of 5 U.S.C. 554 et seq.

3. Section 19(d) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 919(d), provides in pertinent part:

> Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be

conducted in accordance with the provisions of section 554 of title 5.

STATEMENT

This case concerns the validity of a principle of adjudication—the "true doubt" rule—that the Department of Labor has for many years applied in resolving benefits claims under the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.*, and the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* That rule provides that when evidence submitted by the claimant and by the party opposing an award of benefits is of equal weight, the remaining doubt is resolved in favor of the claimant. See, *e.g.*, *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 144 n.12 (1987) ("The Benefits Review Board (BRB) 'has consistently upheld the principle that, where true doubt exists, that doubt shall be resolved in favor of the claimant.' *Lessar* v. *C.F. & I. Steel Corp.*, 3 BLR 1-63, 1-68 (1981)."); App., *infra*, 4a, 19a & n.3. In these cases, the court of appeals held that application of the "true doubt" rule is inconsistent with this Court's decision in *Mullins Coal Co.* v. *Director, OWCP, supra*, with one of the Department's own regulations implementing the BLBA (20 C.F.R. 718.403), and with Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. 556(d).

A. *Greenwich Collieries* v. *Director, OWCP*

1. Andrew Ondecko, the claimant in *Greenwich Collieries*, worked as a coal miner for 31 years before applying for disability benefits under the BLBA. App., *infra*, 3a. The Department's Office of Workers' Compensation Programs (OWCP) initially denied benefits, and Ondecko requested a hearing before an administrative

law judge (ALJ). See 20 C.F.R. 725.410, 725.421 *et seq.* The ALJ determined that Ondecko had pneumoconiosis and was totally disabled by that disease, and she awarded benefits.[2] App., *infra*, 41a, 44a.

In finding the existence of pneumoconiosis, the ALJ considered 33 x-ray interpretations by five highly qualified experts.[3] App., *infra*, 40a-41a. One of those experts read five x-rays as positive for the disease; the others read the same and different films as negative. *Ibid.* The ALJ concluded, however, that "the fact that at least one [expert] repeatedly found evidence of pneumoconiosis [was] significant enough to raise true doubt on the issue of pneumoconiosis notwithstanding the number of negative interpretations." *Id.* at 41a. Because "[t]rue doubt is to be resolved in favor of the Claimant," the ALJ found that Ondecko had established the existence of the disease. *Ibid.*

In finding that the claimant was totally disabled by pneumoconiosis, the ALJ considered eight medical opinions, four of them supporting a finding of disability and four finding the claimant not disabled.[4] App., *infra*, 43a.

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[2] The ALJ also found that the disease arose out of coal mine employment. See 30 U.S.C. 902(b) (definition of pneumoconiosis); 20 C.F.R. 718.203(a). That finding was based on an unrebutted statutory presumption of causation available to any miner with at least ten years of coal mine employment, and it was not challenged before the Benefits Review Board or the court of appeals. App., *infra*, 41a-42a. See 30 U.S.C. 921(c)(1); 20 C.F.R. 718.203(b).

[3] Of the 44 x-ray interpretations in the record, the ALJ considered the 33 provided by those with best objective qualifications—*i.e.*, those who were both Board-certified in radiology and specially certified as having demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis ("B-readers"). App., *infra*, 40a; see *id.* at 20a n.4; *Mullins Coal*, 484 U.S. at 145 n.16.

[4] A black lung claimant may establish total disability using pulmonary function tests, blood gas tests, proof of a characteristic heart condition, or the opinion of a physician exercising "reasoned

The ALJ recognized the qualifications of the four physicians who found no disability, but gave special consideration to the contrary opinion of the physician who had treated Ondecko for more than 20 years. *Id.* at 43a-44a. The ALJ concluded that "the fact that the Claimant's treating physician consider[ed] him totally disabled * * * raise[d] true doubt in face of the Employer's experts[']opinions," and she again resolved that doubt in favor of the claimant. *Id.* at 44a.

2. Greenwich Collieries appealed to the Department's Benefits Review Board, see 20 C.F.R. 725.481, which affirmed the ALJ's determination. App., *infra,* 17a-23a. The Board noted that negative x-ray interpretations are "not a trustworthy indicator of the absence of pneumoconiosis," and it agreed that the ALJ was not required to accept the negative interpretations solely because there were more of them. *Id.* at 19a. The Board then concluded that the ALJ had "properly discussed and weighed all relevant medical evidence" on the pneumoconiosis issue, and that because she "found the positive and negative interpretations by [expert] physicians * * * to be equally probative," she had properly resolved the question in Ondecko's favor under the "true doubt" rule. *Id.* at 19a-20a & n.3.

On the question of disability, the Board noted that the ALJ had "stated her basis for finding the evidence [on each side] equally probative," and it concluded that "her discussion of the medical evidence * * * supports the inference" that she had properly considered all of the

medical judgment." 20 C.F.R. 718.204(c)(1)-(4). Ondecko relied only on medical opinions. App., *infra,* 42a-44a. Under the BLBA, "total disability" means inability of a miner to do his usual coal mine work or work comparable to it. 30 U.S.C. 902(f)(1)(A); 20 C.F.R. 718.204(b). In this case, the claimant's usual coal mine work involved dragging pipes that weighed up to 150-200 pounds. App., *infra,* 42a n.10.

conflicting evidence. The Board declined to "reweigh the evidence or substitute its inferences" for those of the ALJ. App., *infra,* 22a.

3. The court of appeals vacated and remanded. App., *infra,* 1a-16a; see 30 U.S.C. 932(a) (incorporating 33 U.S.C. 921(c)). First, the court read this Court's decision in *Mullins Coal* to require that a claimant prove the existence of pneumoconiosis by a preponderance of the evidence. *Id.* at 5a-6a.[5] Because the "true doubt" rule allows a claimant to prevail when the evidence is in equipoise, the court of appeals held that application of the rule was inconsistent with *Mullins Coal.* It explicitly disagreed in this regard with the decision in *Freeman United Coal Mining Co.* v. *OWCP,* 988 F.2d 706 (7th Cir. 1993) (per curiam), which construed *Mullins Coal* to support use of the "true doubt" rule to prove pneumoconiosis. App., *infra,* 6a & n.3.

Second, the court held that 20 C.F.R. 718.403, which provides generally that "the burden of proving a fact alleged in connection with [a BLBA claim] shall rest with the party making such allegation," imposes on the claimant the burden of persuasion with respect to the matters in issue. App., *infra,* 8a-11a. Although the court acknowledged (*id.* at 8a-9a) this Court's statement in *NLRB* v. *Transportation Management Corp.,* 462 U.S. 393, 404 n.7 (1983), that similar language in Section 7(c) of the APA, 5 U.S.C. 556(d), imposes only a burden of production, rather than persuasion, the court of appeals found the difference between the terms "burden of proving" (in Section 718.403) and "burden of proof" (in Sec-

[5] *Mullins Coal* construed the Department of Labor's "interim presumption" regulation, 20 C.F.R. 727.203, which applied to claims that were filed before the Department's permanent regulations became effective. See 20 C.F.R. 727.200. The permanent regulations apply to all claims, including the one at issue in *Greenwich Collieries,* filed after March 31, 1980. See 20 C.F.R. 718.2.

tion 7(c)) sufficient to distinguish this case from *Transportation Management*. App., *infra*, 9a-11a.

As a result of its construction of Section 718.403, the court found it unnecessary to address whether Section 7(c) of the APA independently allocated the burden of persuasion to the claimant. App., *infra*, 11a & n.4. The court did conclude, however, that Section 7(c) requires whichever party bears the burden of persuasion to establish each relevant point by a preponderance of the evidence. *Id.* at 12a-13a. Because the "true doubt" rule allows the claimant to prevail when the evidence is in equipoise, the court concluded that use of the rule violates Section 7(c) of the APA.[6] *Id.* at 13a-15a. The court thought it unclear, however, whether in the absence of the "true doubt" rule the ALJ would have found Ondecko's evidence sufficient under the preponderance of the evidence standard, and it therefore remanded the case to allow the ALJ to make that determination. *Id.* at 15a-16a.

B. *Maher Terminals, Inc.* v. *Director, OWCP*

1. Michael Santoro sustained a work-related back and neck injury on July 23, 1985, while employed by respondent Maher Terminals, Inc. 93-474 Pet. App. A3. Later, after having been treated and released to return to work, Santoro experienced increasing pain and numbness; by August 15, he was unable to get out of bed. *Id.* at A4. An examining physician at the hospital reported spinal cord swelling and irregularity, and a neurosurgeon, after reviewing test results and doing a follow-up examination, suspected a tumor in the spinal cord. *Id.* at A4, A19. Surgery in fact disclosed such a tumor, which

[6] The court noted that express statutory provisions may override the relevant provisions of the APA, but it concluded that the BLBA contains no such provision. App., *infra*, 13a n.5, 15a.

was identified as an astrocytoma, a rare form of nerve cancer. *Ibid.* Santoro became paraplegic and mute, and died in March 1986 from cardiac arrest caused by the astrocytoma. *Ibid.*

Santoro's widow, the claimant in *Maher Terminals* and petitioner in No. 93-474, filed a claim under the LHWCA, alleging that the July 1985 injury had rendered her husband totally disabled and caused his death. 93-474 Pet. App. A30, A35. She relied primarily on reports and testimony by the neurosurgeon, who concluded that trauma from the injury produced swelling, which significantly hastened Santoro's disability and death by aggravating a tumor that was previously dormant and might have remained so for many years. *Id.* at A31, A36-A37. The company's expert, a neurologist and pathologist who reviewed relevant records but never actually examined Santoro, testified that it was "medically impossible" that Santoro had suffered a severely traumatic neck injury in his accident at work. He was of the view that the tumor had erupted spontaneously, destroying the spinal cord "without reference to any external event." *Id.* at A31-A32, A38-A39.

The ALJ found that Santoro's widow had established both his injury and circumstances at work that could have caused the injury. 93-474 Pet. App. A30-A31. Under Section 20(a) of the Act, 33 U.S.C. 920(a), that showing raised a presumption of coverage and shifted to the employer the burden of producing "substantial evidence to the contrary"—*i.e.*, "evidence specific and comprehensive enough to sever the potential connection between the resultant impairment and work environment." 93-474 Pet. App. A31. The ALJ concluded that the testimony of the employer's expert was sufficient to rebut the statutory presumption, and proceeded to consider the case "on the basis of the record as a whole." *Id.* at A32.

After thoroughly reviewing the evidence, 93-474 Pet. App. A32-A44, the ALJ credited the neurosurgeon's opinion because it was "anchored in his experience as a hands-on neurosurgeon," but noted that some parts of his testimony appeared "inconsistent or contradictory" (*id.* at A37, A40, A44); similarly, he found the employer's expert highly qualified and persuasive (*id.* at A31-A32, A40), but rejected his conclusion that Santoro had suffered no neck injury (*id.* at A40) and questioned his opinion regarding the presence and possible effect of post-traumatic swelling (*id.* at A43-A44). On balance, the ALJ found the evidence of causation conflicting and equally probative; deeming the issue "arguable" and "debatable" even after careful weighing of the evidence, the ALJ invoked the "true doubt" rule and awarded benefits to the claimant. *Id.* at A39, A44; see also *id.* at A46 (order denying rehearing).

2. The Benefits Review Board affirmed. 93-474 Pet. App. A17-A24. Respondent argued before the Board that application of the "true doubt" rule in effect resurrected the presumption of causation initially provided by Section 20(a) of the LHWCA, 33 U.S.C. 920(a), whereas this Court held in *Del Vecchio* v. *Bowers*, 296 U.S. 280, 286 (1935), that that presumption "falls out of the case" after it is successfully rebutted by the employer. See 93-474 Pet. App. A20-A21. The Board rejected that argument, holding that the "true doubt" rule is consistent with *Del Vecchio* because it comes into play only after the ALJ has weighed all of the evidence (without regard to the rebutted statutory presumption) and found it evenly balanced. *Ibid.* The Board noted that the rule is "well-established" under the LHWCA, and declined to depart from it in this case. *Id.* at A21. After reviewing the evidence and the ALJ's opinion, *id.* at A21-A23, the Board found no error in the ALJ's analysis or his application of the "true doubt" rule, and it affirmed the award of benefits. *Id.* at A23.

3. The same panel of the Third Circuit that decided *Greenwich Collieries* also vacated the Board's decision in *Maher Terminals*. 93-474 Pet. App. A1-A16; see 33 U.S.C. 921(c). The court agreed with the Board that the ALJ had not relied improperly on the Section 20(a) presumption, *id.* at A6-A7, and it recognized that other courts had applied the "true doubt" rule under the LHWCA. *Id.* at A5-A6, A14-A15. Having traced the origins of the "true doubt" rule to the decision in *Fidelity & Casualty Co.* v. *Burris*, 59 F.2d 1042, 1044 (D.C. Cir. 1932), however, it dismissed that decision's justification for the rule, based on the LHWCA's compensatory purposes, as having "no logical basis in the law." 93-474 Pet. App. A6. The court further held in this case (unlike in *Greenwich Collieries*) that Section 7(c) of the APA not only specifies a standard of proof (preponderance of the evidence), but affirmatively allocates the burden of persuasion under that standard to a benefits claimant. 93-474 Pet. App. A10. Because the "true doubt" rule allows a claimant to prevail when the evidence is in equipoise, the court concluded that its application violates the APA. *Id.* at A14, A15-A16.

The court of appeals acknowledged (93-474 Pet. App. A8) this Court's statement in *NLRB* v. *Transportation Management Corp.*, 462 U.S. at 404 n.7, that Section 7(c) "determines only the burden of going forward, not the burden of persuasion." The court treated that statement as "dicta" (93-474 Pet. App. A8-A9), however, apparently because the specific burden-shifting issue in *Transportation Management* involved an affirmative defense, rather than the underlying unfair labor practice charge. The court distinguished the affirmative defense situation as a "logical exception" to what it considered the APA's general rule that a claimant must bear the burden of persuasion "on the subject of the litigation." *Id.* at A13-A14.

Similarly, the court of appeals concluded that despite its unrestricted language concerning the effect of Section 7(c), *Transportation Management* interpreted only the first sentence of that Section, which provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 93-474 Pet. App. A7, quoting 5 U.S.C. 556(d). The court pointed out that in *Steadman* v. *SEC*, 450 U.S. 91, 98, 102 (1981), this Court construed the third sentence of Section 7(c) to require that administrative determinations governed by the APA be made in accordance with a "preponderance of the evidence" standard.[7] 93-474 Pet. App. A8-A9. Although it recognized that "*Steadman*, standing alone, does not allocate the burden of proof," the court reasoned that Section 7(c) prohibits issuance of an order except on a preponderance of the evidence. 93-474 Pet. App. A10. Because it viewed a benefits claimant as the party who "seeks to change the status quo," *ibid.*, the court concluded that Section 7(c) prohibits any such change based on the "true doubt" rule—*i.e.*, where the evidence is in equipoise, so that by definition the claimant has not supported her position with a preponderance of the evidence. 93-474 Pet. App. A14. In doing so, the court acknowledged that the legislative history of Section 7(c), "taken together with *Steadman*, suggests that the party who seeks a denial of relief is *also* required by section 7(c) to sustain such denial by a preponderance of the evidence." 93-474 Pet. App. A11.

The court of appeals explicitly rejected decisions of the First, Fifth, Ninth and District of Columbia Circuits

[7] The third sentence of Section 7(c) provides that "[a] sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. 556(d).

upholding the "true doubt" rule under the LHWCA, remarking only that those courts had "not seriously considered the applicability of the APA to the question at hand."[8] 93-474 Pet. App. A14-A15 (citing *Avondale Shipyards, Inc.* v. *Kennel*, 914 F.2d 88 (5th Cir. 1990) (per curiam); *Parsons Corp.* v. *Director, OWCP*, 619 F.2d 38 (9th Cir. 1980); *Bath Iron Works Corp.* v. *White*, 584 F.2d 569 (1st Cir. 1978); *Fidelity & Casualty Co.* v. *Burris*, 59 F.2d 1042 (D.C. Cir. 1932)). The court recognized that the opinion in *Freeman United Coal Mining Co.* v. *OWCP*, 988 F.2d 706 (7th Cir. 1993) (per curiam), did consider the effect of the APA and upheld application of the "true doubt" rule under the BLBA. But the court nevertheless declined to follow *Freeman*, believing it to be inconsistent with this Court's decision in *Mullins Coal* and with the panel's previous decision in *Greenwich Collieries*.

As in *Greenwich Collieries*, the court thought it unclear whether, in the absence of the "true doubt" rule, the ALJ would have found Mrs. Santoro's evidence sufficient under the preponderance-of-the-evidence standard. It therefore vacated the decision of the Benefits Review Board with directions to remand the case to the ALJ to make that determination. 93-474 Pet. App. A16.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in invalidating use of the "true doubt" rule in adjudicating claims under the Black Lung Benefits Act (BLBA) and the Longshore and Harbor Workers' Compensation Act (LHWCA). The court failed to give proper deference to the Department of

[8] We quote the published text of the court's opinion, 992 F.2d at 1284, which differs somewhat from the text given in the appendix to the petition in No. 93-474.

Labor's longstanding practice in carrying out its responsibilities under those laws, to its construction of statutes it is charged with administering, and to its interpretation of its own regulations. Not surprisingly, the court's conclusions conflict with decisions of a number of other courts of appeals and with this Court's decision in *Transportation Management*. The conflicting appellate decisions on this issue will disrupt the Secretary's administration of two important workers' compensation schemes, each of which generates several thousand contested claims every year. Moreover, because the lower courts have acknowledged the conflict among their decisions, there is little chance that the matter will be resolved without intervention by this Court. For these reasons, review is warranted at this time.

1. For fifty years or more, administrators and federal courts—including the Third Circuit—reviewing claims for benefits under the LHWCA have applied the principle that "doubtful questions incapable of scientific solution are to be resolved in favor of the workman." *F.H. McGraw & Co.* v. *Lowe*, 145 F.2d 886, 887 n.1, 888 (2d Cir. 1944) (quoting administrative decision). See also, *e.g.*, *Fidelity & Casualty Co.* v. *Burris*, 59 F.2d 1042, 1044 (D.C. Cir. 1932); *Southern S.S. Co.* v. *Norton*, 101 F.2d 825, 827 (3d Cir. 1939); *Southern Pac. Co.* v. *Sheppeard*, 112 F.2d 147, 148 (5th Cir. 1940); *Parsons Corp.* v. *Director, OWCP*, 619 F.2d 38, 41 (9th Cir. 1980); *Noble Drilling Co.* v. *Drake*, 795 F.2d 478, 481 (5th Cir. 1986) (per curiam); *Avondale Shipyards, Inc.* v. *Kennel*, 914 F.2d 88, 90-91 (5th Cir. 1990) (per curiam); *Jones* v. *Director, OWCP*, 977 F.2d 1106, 1109 (7th Cir. 1992). When Congress in 1969 enacted the legislation that became the BLBA, it incorporated many provisions of the LHWCA, including its procedures for the processing and adjudication of claims. 30 U.S.C. 932(a), incorporating, *inter alia*, 33 U.S.C. 919-921. Accordingly, the

Director of the Office of Workers' Compensation Programs, the Benefits Review Board, and the courts have applied to black lung cases the evidentiary rule developed under the LHWCA, resolving in favor of the claimant those factual questions on which the evidence is found to be in equipoise. See, *e.g.*, App., *infra*, 19a n.3; *Lesicko* v. *Peabody Coal Co.*, 1 Black Lung Rep. (MB) 1-87, 1-91 (Ben. Rev. Bd.), aff'd on reconsideration, 1 Black Lung Rep. (MB) 1-276, 1-282 (Ben. Rev. Bd. 1977), rev'd on other grounds, 581 F.2d 121 (7th Cir. 1978); *Provance* v. *United States Steel Corp.*, 1 Black Lung Rep. (MB) 1-483, 1-486 (Ben. Rev. Bd. 1978); *Skukan* v. *Consolidation Coal Co.*, 993 F.2d 1228, 1238 (6th Cir. 1993); *Freeman United Coal Mining Co.* v. *OWCP*, 988 F.2d 706, 710 (7th Cir. 1993) (per curiam); *Greer* v. *Director, OWCP*, 940 F.2d 88, 90 & n.3 (4th Cir. 1991).[9]

The "true doubt" principle does not require that a claimant prevail merely because the evidence on a point is in conflict. Nor does it relieve the adjudicator of the obligation to weigh the claimant's evidence against other evidence in the record. The rule provides only that when the adjudicator finds that the evidence on each side is evenly balanced (taking account of both its quantity and its quality), the doubt finally remaining should be resolved in favor of the claimant. See, *e.g.*, App., *infra*, 19a n.3; *Provance* v. *United States Steel Corp.*, 1 Black Lung Rep. (MB) at 1-486. In the Secretary's view, an ALJ should find the evidence evenly balanced only in narrow circumstances, after carefully considering all the evidence and exhausting all methods of evaluating it. See also *Betz* v. *Arthur Snowden Co.*, 14 Ben. Rev. Bd. Serv.

[9] Indeed, prior to this case, the Third Circuit itself had approved use of this rule in black lung cases, just as it had under the LHWCA. See *Kowalchick* v. *Director, OWCP*, 893 F.2d 615, 621 (3d Cir. 1990); *Bonessa* v. *United States Steel Corp.*, 884 F.2d 726, 730 (3d Cir. 1989).

(MB) 805, 808 (1981) (before applying "true doubt" rule, ALJ "must indicate with some specificity what evidence he believes or disbelieves and why").[10] So understood, the "true doubt" rule is plainly permissible under the LHWCA, the BLBA, and the APA.

a. Claims adjudications under the LHWCA are governed generally by the APA, see 33 U.S.C. 919(d), but are otherwise to be conducted without regard to "common law or statutory rules of evidence or * * * technical or formal rules of procedure." 33 U.S.C. 923(a). As noted above, Section 20(a) of the Act, 33 U.S.C. 920(a), provides that in LHWCA proceedings, "it shall be presumed, in the absence of substantial evidence to the contrary[,] * * * [t]hat the claim comes within the provisions of [the Act]." See, *e.g.*, 93-474 Pet. App. A30-A31. If the employer comes forward with substantial evidence to rebut that presumption, the presumption itself drops from the case, and the finder of fact must consider all of the evidence and reach an independent conclusion. *Id.* at A31; *Del Vecchio* v. *Bowers*, 296 U.S. 280, 286 (1935); compare *St. Mary's Honor Center* v. *Hicks*, 113 S. Ct. 2742, 2747 (1993); see also Fed. R. Evid. 301. Neither the Act nor the regulations prescribe which party shall bear the risk of non-persuasion in that final analysis. The "true doubt" rule represents, in effect, the Secretary's administrative judgment, developed in conjunction with and long accepted by the courts, that that risk should rest on the employer.

The "true doubt" rule is but one application of the more general principle that the LHWCA is a remedial

[10] In *Greenwich Collieries*, for example, the Director took the position in the court of appeals that the ALJ did not adequately weigh the medical evidence before finding "true doubt" on the question of the claimant's total disability, and suggested that the court remand the case for further proceedings on that issue. Gov't C.A. Br. 39, 42-45.

statute that should be construed liberally in favor of the employee or his dependents. See, *e.g.*, *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 268 (1977); *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953). In addition, the rule draws support from the highly hazardous nature of longshoring, see S. Rep. No. 1125, 92d Cong., 2d Sess. 2 (1972); the likely relative resources and access to specialized evidence, such as expert medical testimony, of employers and injured employees; and the special rules historically fashioned to protect the rights of maritime workers. See *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 246-247 (1942). Under the circumstances, the Secretary's longstanding practice of imposing the risk of non-persuasion in close cases on the employer rather than the employee is based on a permissible construction and application of the LHWCA, and it is entitled to deference from the courts. See *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 402-403 (1983) (deferring to NLRB's allocation of evidentiary burdens); cf. *Pauley* v. *BethEnergy Mines, Inc.*, 111 S. Ct. 2524, 2534-2539 (1991) (deferring to Secretary's interpretation of black lung statute where issues involved "exercise of judgment grounded in policy concerns"); *Steadman* v. *SEC*, 450 U.S. 91, 103-104 (1981) (longstanding agency interpretation supports inference of congressional intent). And, as noted above, the "true doubt" rule has been uniformly accepted and applied by the courts for over half a century, until the Third Circuit's decision in this case.

b. The "true doubt" rule developed in the LHWCA context was carried over in the Department of Labor's implementation of the BLBA, which built on the provisions of the LHWCA. See 30 U.S.C. 932(a). The rule therefore deserves similar deference in the latter context. In addition, in the case of the BLBA, the rationale

giving rise to the rule is set out in the Act's implementing regulations, which are expressly authorized by the BLBA, 30 U.S.C. 902(f), 936(a) and 957. Thus 20 C.F.R. 718.3(c) states:

> Congress intended that claimants be given the benefit of all reasonable doubt as to the existence of total or partial disability or death due to pneumoconiosis. This part shall be construed and applied in that spirit and is designed to reflect that intent.

Both that general principle and the "true doubt" rule are consistent with Congress's expressed intentions. As other courts have recognized, the Senate Report accompanying the 1972 amendments to the BLBA stated that the statute "is intended to be a remedial law * * *. In the absence of definitive medical conclusions there is a clear need to resolve doubts in favor of the disabled miner or his survivors." S. Rep. No. 743, 92d Cong., 2d Sess. 11 (1972); see also, *e.g., Freeman United,* 988 F.2d at 709-710.[11] When Congress amended the statute again in 1978, the Senate report "underscore[d] and reaffirm[ed]" the Senate's earlier intent that doubts should be resolved in favor of the claimant, and stated that the Secretary of Labor (who first received authority to define "total disability" in 1978, see *Pittston Coal Group* v. *Sebben,* 488 U.S. 105, 110 (1988)) was expected to "promulgate standards which give the benefit of any doubt

[11] Following the 1972 amendments, the Department informed Congress, in discussing the "burden of proof" under the black lung statute, that "conflicts in the evidence are required to be resolved by the adjudicator in favor of the claimant." N. Snyder & M. Solomons, *Black Lung—A Study In Occupational Disease Compensation* 29, 30 (1976), reprinted in *Black Lung Benefits Reform Act, 1976: Hearings on H.R. 10760 and S. 3183 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare,* 94th Cong., 2d Sess. 459, 487, 488 (1976).

to the coal miner." S. Rep. No. 209, 95th Cong., 1st Sess. 13 (1977); see *Freeman United,* 988 F.2d at 710 n.5.

Application of the "true doubt" rule also is sound as a matter of "policy and fairness based on experience in * * * different situations," the traditional grounds for assigning burdens of persuasion. 9 John H. Wigmore, *Evidence* § 2486, at 291 (Chadbourn rev. ed. 1981). Claimants have several disadvantages in black lung cases. They are often sick or elderly individuals with limited resources, see Employment Standards Admin., U.S. Dep't of Labor, *A Sample Survey of All Sources of Both Monetary and Non-Monetary Income of Black Lung Beneficiaries* 14-18 (1983), and "it is difficult for coal miners whose health has been impaired by the insidious effects of their work environment to prove that their diseases are totally disabling and coal mine related, or that those diseases are in fact pneumoconiosis." *Mullins Coal Co.* v. *Director, OWCP,* 484 U.S. 135, 158 (1987); see also *Collins* v. *Old Ben Coal Co.,* 861 F.2d 481, 489 (7th Cir. 1988) ("clinical tests used to detect pulmonary impairments may be fallible"); S. Rep. No. 743, *supra,* at 9 (x-rays are "an imperfect means of ascertaining the existence of pneumoconiosis in coal miners").

In rejecting the "true doubt" rule under the BLBA, the court of appeals mistakenly relied on Section 718.403 of the Secretary's regulations, which states:

> Except as provided in this subchapter [20 C.F.R. Parts 718-727], the burden of proving a fact alleged in connection with any provision of this part shall rest with the party making such allegation.

The Secretary construes Section 718.403 to allocate only the burden of production, not the burden of persuasion. That construction of the Secretary's own regulation is neither plainly erroneous nor inconsistent with the regulation's language, and it therefore is entitled to

"controlling weight." *E.g., Stinson* v. *United States,* 113 S. Ct. 1913, 1919 (1993); see also *Mullins Coal,* 484 U.S. at 159.

As this Court held in *Transportation Management,* 462 U.S. at 404 n.7, and as even the court below recognized (App., *infra,* 8a-9a), the term "burden of proof" may refer to the burden of either production or persuasion. See also, *e.g., Black's Law Dictionary* 196 (6th ed. 1990); 9 John H. Wigmore, *supra,* §§ 2485-2488. The regulation's use of the phrase "burden of proving," rather than "burden of proof," is purely stylistic. The court of appeals' attempt to distinguish *Transportation Management* on the basis of that inconsequential difference (App., *infra,* 9a-11a) is wholly unpersuasive. Moreover, if Section 718.403 did allocate the burden of persuasion, it would conflict with Section 718.3(c), quoted above, which clearly states that the Part 718 regulations "[were] designed" and "shall be construed and applied" so as to give claimants "the benefit of all reasonable doubt" as to the existence of death or disability due to pneumoconiosis. See *Skukan,* 993 F.2d at 1238. And if there were any inconsistency between Sections 718.3(c) and 718.403, it would be resolved by the introductory clause in the latter provision: "Except as provided in this subchapter." Section 718.3(c), as construed by the Secretary, makes special provision for situations of "true doubt."

c. The court of appeals held in *Maher Terminals* that Section 7(c) of the APA, 5 U.S.C. 556(d), independently imposes the burden of persuasion on benefits claimants; and it held in both cases that so long as that burden rests on the claimant, application of the "true doubt" rule violates the APA's further requirement that the party bearing that burden prove his case by a preponderance of the evidence. We agree that the "true doubt" rule, in the narrow circumstances in which it applies,

allocates the risk of non-persuasion to the employer. That allocation however, does not contravene the APA.

As the court of appeals recognized (93-474 Pet. App. A9-A11), Section 7(c) addresses two separate questions: the burden imposed upon the proponent of a particular agency order, and what standard of proof must be met by whichever party bears the burden of persuasion. As discussed above, this Court has made it clear that Section 7(c)'s first sentence, which provides generally that "the proponent of a rule or order has the burden of proof," requires that the party advocating a particular result bear the burden of *production* with respect to that issue. *Transportation Management,* 463 U.S. at 404 n.7.[12] As to the second question, this Court has held that the third sentence of Section 7(c)—which provides that "[a] sanction may not be imposed or rule or order issued

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[12] See also *Skukan,* 993 F.2d at 1235-1239; *Freeman United,* 988 F.2d at 711; *Dazzio* v. *FDIC,* 970 F.2d 71, 77 (5th Cir. 1992); *Merritt* v. *United States,* 960 F.2d 15, 18 (2d Cir. 1992); *Hazardous Waste Treatment Council* v. *United States EPA,* 886 F.2d 355, 366-368 (D.C. Cir. 1989) (per curiam), cert. denied, 498 U.S. 849 (1990); *Alameda County Training & Employment Bd.* v. *Donovan,* 743 F.2d 1267, 1269 (9th Cir. 1984) (per curiam); *Maine* v. *United States Dep't of Labor,* 669 F.2d 827, 829 (1st Cir. 1982); *Environmental Defense Fund, Inc.* v. *EPA,* 548 F.2d 998, 1004, 1013-1015 (D.C. Cir. 1976), cert. denied, 431 U.S. 925 (1977); *Old Ben Coal Corp.* v. *Interior Bd. of Mine Operations Appeals,* 523 F.2d 25, 39-40 (7th Cir. 1975) (opinion on denial of petition for rehearing); *Attorney General's Manual on the Administrative Procedure Act* 75 (1947); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 36 (1946) (burden of proof means "that the party initiating the proceeding has the general burden of coming forward with a prima facie case"); S. Rep. No. 752, 79th Cong., 1st Sess. 22 (1945) (same); 4 Jacob A. Stein, Glenn A. Mitchell & Basil J. Mezines, *Administrative Law* § 24.02, at 24-21 n.3 (1993); 3 Kenneth C. Davis, *Administrative Law Treatise* § 16.9, at 257-258 (2d ed. 1980).

except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence"—generally requires that the party who bears the burden of persuasion on an issue must establish its position by a preponderance of the evidence. *Steadman* v. *SEC*, 450 U.S. at 98-102.

The court of appeals acknowledged as a possibility what is, in our view, the best reading of Section 7(c) in light of *Transportation Management* and *Steadman*: that "the APA * * * fails to allocate the burden of persuasion, which gives each administrative agency the discretion to do so without contravening the APA, provided that the party to whom it allocates the burden proves its case by a preponderance of the evidence." 93-474 Pet. App. A10. The court rejected that interpretation, however, on the ground that if the APA requires particular agency action to be supported by a preponderance of the evidence, "the inevitable conclusion is that the proponent of that order must bear the burden of persuasion." *Id.* at A11. That conclusion, however, is by no means "inevitable."

First, as the court of appeals recognized (93-474 Pet. App. A11), the legislative history of Section 7(c), read together with *Steadman*, provides equal support for the proposition "that the party who seeks a denial of relief is *also* required" to prove its case by a preponderance of the evidence. The resulting ambiguity is best accommodated not, as the court of appeals held, by placing the risk of non-persuasion always on the party seeking to change whatever happens to be the *status quo* at the time that the proposal for agency action arises, but by allowing an agency to determine, in light of the relevant considerations, which party should bear that risk in any particular statutory context.

Second, the "logical" exception that the court was forced to recognize for "affirmative defenses" (93-474 Pet. App. A14), like the defense at issue in *Transportation Management*, is in fact no more logical than the principle on which the Secretary relies here. That principle applies in the relatively uncommon instances in which an agency concludes, on the basis of its factual and policy expertise, that where both the proponent and the opponent of agency action have produced substantial probative evidence, and that evidence is in equipoise, the doubt should be resolved in favor of particular agency action.

Third, the court of appeals' decision, which *requires* agencies to allocate the risk of non-persuasion in the same manner regardless of the context or circumstances, itself contravenes the policy of the APA, which was not intended to impose undue restrictions on government operations. See 5 U.S.C. 556(d); S. Rep. No. 752, *supra*, at 5, 22; H.R. Rep. No. 1980, *supra*, at 16, 36. Allocation of the burden of persuasion in most civil litigation is a matter generally left to the courts, to be resolved as a matter of "policy and fairness based on experience in * * * different situations." 9 John H. Wigmore, *supra*, § 2486, at 291. No more restrictive policy should apply to administrative agencies under the APA.

d. Even if Section 7(c) of the APA were construed to bar an agency from applying an adjudicatory principle like the "true doubt" rule in other circumstances, it does not have that effect under the LHWCA. As explained above (see page 14, *supra*), the principle that doubts are to be resolved in favor of the claimant was firmly established as a rule of construction under the LHWCA when the APA was enacted. There is no indication that Congress intended the APA in effect to revise the LHWCA

by reversing that settled practice. To the contrary, Section 7(c) begins with the phrase "[e]xcept as otherwise provided by statute," thereby expressing an intent to preserve principles of proof and decisionmaking that had already developed under other statutory schemes. See *Steadman*, 450 U.S. at 103-104 (consistent pre- and post-APA practice is persuasive evidence of Congressional intent).

Similarly, in the case of the BLBA, the statute states that "[e]xcept as otherwise provided in this chapter [30 U.S.C. 801-962], the provisions of sections 551 to 559 and sections 701 to 706 of title 5 shall not apply to the making of any order, notice, or decision made pursuant to this chapter, or to any proceeding for the review thereof." 30 U.S.C. 956. Thus, 5 U.S.C. 556(d) is expressly rendered inapplicable under the BLBA.[13] To be sure, 30 U.S.C. 932(a) incorporates certain provisions of the LHWCA, including 33 U.S.C. 919(d); and Section 919(d) provides that hearings under the LHWCA shall be conducted in accordance with 5 U.S.C. 554 (and might be read to contemplate the application of 5 U.S.C. 556(d) as well). Section 932(a) creates an "except[ion]," however, where "otherwise provided * * * by regulations of the Secretary." Although the Secretary's regulations generally provide that hearings shall be conducted in accordance with 5 U.S.C. 554 *et seq.*, see 20 C.F.R. 725.452(a), they too create an exception where "otherwise provided" in the regulations themselves. *Ibid*; see also 20 C.F.R. 725.4(a) (making "criteria and standards" of Part 718 applicable under Part 725). As we have explained (see pages 18, 20, *supra*), Section 718.3(c) of

[13] As the court of appeals acknowledged (93-474 Pet. App. A8 n.3), Section 12 of the APA, 5 U.S.C. 559, contemplates that statutes enacted after the APA may expressly supersede or modify 5 U.S.C. 551-559.

the regulations embodies the principle that the claimant shall be given the benefit of the doubt. Thus, in light of the statutory and regulatory exceptions under the BLBA, use of the "true doubt" rule under that statute likewise presents no conflict with Section 7(c) of the APA.

2. The decisions below misinterpret this Court's decision in *Mullins Coal* and conflict with decisions of other courts of appeals.

a. In *Greenwich Collieries*, the court of appeals read *Mullins Coal* to require that any black lung claimant establish the existence of pneumoconiosis by a preponderance of the evidence. App., *infra*, 5a-6a. *Mullins*, however, construed the regulations in 20 C.F.R. [illegible]. 727, which are worded quite differently from the regulations in Part 718 that are at issue in this case. Compare 20 C.F.R. 727.203(a) (claimant must "establis[h]" certain conditions; see 484 U.S. at 147) with 20 C.F.R. 718.202(a) (specifying evidence that "may form the basis for a finding of the existence of pneumoconiosis") and 20 C.F.R. 718.3(c) (providing that claimants shall be accorded the benefit of all reasonable doubt).

Moreover, the opinion in *Mullins* did not disapprove use of the "true doubt" rule. In holding that an ALJ was required to weigh all the evidence on both sides before a claimant could invoke the Department's "interim presumption" regulation, the Court explicitly noted the Secretary's use of the "true doubt" rule, observing that "[t]he Benefits Review Board (BRB) 'has consistently upheld the principle that, where true doubt exists, that doubt shall be resolved in favor of the claimant.' *Lessar* v. *C.F. & I. Steel Corp.*, 3 BLR 1-63, 1-68 (1981)." 484 U.S. at 144 n.12. See also *ibid.* ("[t]his position ensures that the employer will win, on invocation or rebuttal, only when its evidence is *stronger* than the claimant's"); *id.* at 156 n.29. The Court did not suggest any disapproval of the rule. The Court did state, in the last

footnote to its opinion, that it need not reach the issue of allocation of burdens of proof under the APA because "the regulation itself requires a claimant to prove an invocation fact by a preponderance of the evidence." *Id.* at 161 n.35. Given the opinion's prior references to the "true doubt" rule, however, and the fact that the rule's validity was not at issue, we think it clear that *Mullins* does not control the outcome of this case.[14] The Third Circuit's decision to the contrary conflicts directly with the decisions in *Skukan*, 993 F.2d at 1235, *Freeman United*, 988 F.2d at 711, and *Adkins* v. *Director, OWCP*, 958 F.2d 49, 52 & n.4 (4th Cir. 1992), all of which held that *Mullins* left the "true doubt" rule intact. See also *Grizzle* v. *Pickands Mather & Co.*, 994 F.2d 1093, 1098 n.7 (4th Cir. 1993) (noting conflict but not addressing issue); *id.* at 1100 (Hall, J., dissenting) (noting conflict and agreeing with Sixth and Seventh Circuits); App., *infra*, 6a & n.3 (acknowledging conflict).

b. The decisions below also create circuit conflicts through their holdings that use of the "true doubt" rule contravenes the Department's BLBA regulations, 20 C.F.R. 718.403, and Section 7(c) of the APA. The holding in *Greenwich Collieries* on the first issue conflicts directly with the Sixth Circuit's decision in *Skukan*, 993 F.2d at 1236-1239, which considered the issue in some detail and held that Section 718.403 does not preclude application of the "true doubt" rule. The holding in

[14] Another statement in the *Mullins* opinion has proven to be inaccurate in light of the Court's subsequent examination of the statutory scheme. Compare 484 U.S. at 154 (stating that interim presumption regulation "satisfie[d]" statutory requirement that it be no more restrictive than earlier regulations) with *Pittston Coal Group* v. *Sebben*, 488 U.S. 105 (1988) (holding the same regulation to be more restrictive).

Maher Terminals (and the effective holding in *Greenwich Collieries*) on the second issue conflicts not only with a proper reading of this Court's decisions in *Steadman* and *Transportation Management*, as discussed above, but also with the decisions in *Freeman United*, 988 F.2d at 710-711, and *Skukan*, 993 F.2d at 1236, both of which explicitly held that the "true doubt" rule is not inconsistent with Section 7(c).[15] See also 93-474 Pet. App. A15 (rejecting *Freeman*); *Grizzle*, 994 F.2d at 1098 n.7 (noting conflict); *Freeman United Coal Mining Co.* v. *OWCP*, 999 F.2d 291, 293 (7th Cir. 1993) (statement of Easterbrook, J., respecting suggestion for rehearing in banc) (acknowledging conflict and concluding that the court of appeals "should let the case proceed to the only tribunal that can supply the cure").

The decision in *Maher Terminals* is also inconsistent with decisions of other circuits upholding use of the "true doubt" rule under the LHWCA. See, *e.g.*, *Avondale Shipyards*, 914 F.2d at 91; *Brown* v. *I.T.T./Continental Baking Co.*, 921 F.2d 289, 295-296 (D.C. Cir. 1990); *Parsons Corp.*, 619 F.2d at 41; *F.H. McGraw & Co.*, 145 F.2d at 887-888. Although those courts did not expressly discuss Section 7(c) of the APA in the cases just cited, in other cases they have construed that provision to impose only a burden of production, not a burden of persuasion. See, *e.g.*, *Dazzio*, 970 F.2d at 77; *Merritt*, 960 F.2d at 18;

[15] *Maher Terminals* construed the LHWCA, while in *Skukan* and *Freeman* the "true doubt" issue arose under the BLBA. The rule operates in the same manner under both statutes, however, and the courts' differing views of the APA's requirements would surely have resulted in a different outcome had either the Sixth or Seventh Circuit decided either case below. Indeed, the court in *Maher Terminals* itself characterized its prior decision in *Greenwich Collieries* as having "held that the true doubt rule [is] inconsistent with the APA in cases involving the [BLBA]." 93-474 Pet. App. A7.

Alameda County Training & Employment Bd., 743 F.2d at 1269; *Hazardous Waste Treatment Council*, 886 F.2d at 366; *Environmental Defense Fund*, 548 F.2d at 1013-1015. The First Circuit, which has used the "true doubt" rule in reviewing agency action, see *Bath Iron Works Corp.* v. *White*, 584 F.2d 569, 574 (1978), has also held that Section 7(c) of the APA allocates only the burden of production. *Maine*, 669 F.2d at 829. It is therefore unlikely that any of the courts of appeals will reevaluate their approval of the "true doubt" rule based on the Third Circuit's analysis of Section 7(c).

c. The court of appeals' invalidation of the long-standing "true doubt" rule threatens to disrupt the Secretary's administration of the LHWCA and the BLBA. Administrative law judges receive an estimated 4000 new LHWCA cases and 3000 new black lung cases each year, and they have a backlog of approximately the same number of cases under each statute. The Benefits Review Board receives an estimated 3300 petitions for review of ALJ decisions in such cases every year, and has a backlog of approximately 4600 additional cases. Based on past experience, 24% of BLBA cases may be expected to arise in the Third Circuit. See Employment Standards Admin., U.S. Dep't of Labor, *Black Lung Benefits Act, Annual Report on Administration of the Act During Calendar Year 1991*, at 22 (1992). The validity of the "true doubt" rule has been challenged in three circuits in the last year, and the Fourth Circuit, which avoided decision on the issue in *Grizzle*, has at least three pending cases in which the validity of the rule has been raised.[16] Moreover, the Third Circuit's interpretation of the APA presumably applies to all administrative adjudications subject to the requirements of that statute, and therefore calls into question the validity of any such proceeding in which the agency has allocated the risk of non-persuasion to a party other than the proponent of agency action.[17] The decisions below thus present significant and recurring issues on which the courts of appeals are in conflict, and warrant plenary review by this Court.

[16] See *Windsor Coal Co.* v. *McKay*, No. 93-1261 (4th Cir.); *Tilley* v. *Ranger Fuel Co.*, No. 93-1097 (4th Cir.); *Hale* v. *Island Creek Coal Co.*, No. 92-1851 (4th Cir.). See also *Malacusky* v. *Director, OWCP*, No. 92-BLA-1642, 1993 BLA LEXIS 1272 *6 (ALJ Aug. 6, 1993) (denying claim in case within the Third Circuit where x-ray evidence of pneumoconiosis was in equipoise).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1993

[17] See *Old Ben Coal Corp.*, 523 F.2d at 39-40 (opinion on denial of petition for rehearing) (burden of persuasion on mine operator contesting imminent danger withdrawal order under Federal Coal Mine Health & Safety Act of 1969); *Hazardous Waste Treatment Council*, 886 F.2d at 366-368 (burden of persuasion on generator of hazardous waste under environmental statute).

APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 92-3270

GREENWICH COLLIERIES, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR, AND
ANDREW ONDECKO, RESPONDENTS

Argued Jan. 12, 1993.
Decided March 23, 1993.

Before HUTCHINSON, SCIRICA, and ROSENN, Circuit Judges.

OPINION FOR THE COURT

ROSENN, Circuit Judge:

This petition for review of a decision of the Director, Office of Workers' Compensation Programs, presents a novel question in this circuit relating to the claimant's burden of proof in a black lung benefit case. Andrew Ondecko, the claimant, filed an application for benefits with the United States Department of Labor pursuant to the Black Lung Benefits Act, 30 U.S.C. §§ 901-45 (1982) (the Act). Ondecko claimed total disability due to pneumoconiosis contracted through

coal mine exposure, and further, that this condition precluded him from performing his regular or comparable work.

The employer, Greenwich Collieries, strongly contested the claim. The Administrative Law Judge (ALJ) found that the copious conflicting medical evidence created a "true doubt" as to the presence of pneumoconiosis, and she utilized the true doubt rule to resolve that doubt in favor of the claimant. The ALJ then found a causal relationship between Ondecko's condition and his tenure in mine employment on the basis of the presumption triggered by the ALJ's finding of pneumoconiosis and Ondecko's 31 years of service in coal mines. *See* 20 C.F.R. § 718.203 (1992). Finally, the ALJ concluded, despite the testimony of a pulmonary specialist that Ondecko was not disabled, that there was a true doubt as to whether Ondecko was totally disabled, and she again resolved this doubt in favor of the claimant.

Greenwich appealed the ALJ's Decision to the Benefits Review Board (the Board), arguing, *inter alia*, that the Administrative Procedure Act (the APA), 5 U.S.C. sections 551-559, 701-06 (1988), requires that a claimant prove the existence of pneumoconiosis and total disability by a preponderance of the evidence, thus precluding use of the true doubt rule in cases under the Act. The Board affirmed the ALJ's decision, and Greenwich thereafter timely appealed to this court.[1] We vacate the Board's decision and remand.

---

[1] This court exercises jurisdiction over a final order of the Board pursuant to section 21(c) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 921(c) (1982), as incorporated by section 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a) (1982).

I. THE FACTS

Ondecko worked for approximately 31 years in coal mine employment. He was most recently employed by Greenwich Collieries as a pipe man in a coal mine where he worked underground fixing and replacing pipe for five to six years.

After considering Ondecko's application for benefits, the Department issued a Preliminary Determination of Non-entitlement, finding that he did not suffer from a disease or disability. Pursuant to Ondecko's request, the ALJ held a hearing, and she subsequently issued a Decision and Order awarding benefits to the claimant.

In reaching her decision, the ALJ found that the copious conflicting medical evidence and testimony created a true doubt as to whether Ondecko suffered from pneumoconiosis and whether that condition rendered him totally disabled. In other words, the evidence as to these ultimate facts was equally probative and therefore in equipoise. She thereupon awarded Ondecko benefits by resorting to the true doubt rule, i.e., she resolved the doubt over the presence or absence of pneumoconiosis and disability in favor of the claimant. Thus, it is unclear whether the ALJ ever considered whether the claimant had proved his entitlement to benefits by a preponderance of the evidence.

II. DISCUSSION

Our review of the propriety of the ALJ's use of the true doubt rule, a question of legal interpretation, is plenary. *See, e.g., Carozza v. United States Steel Corp.*, 727 F.2d 74, 77 (3d Cir. 1984).

> Disability benefits are payable to a miner if (a) he or she is totally disabled, (b) the disability was caused, at least in part, by pneumoconiosis, and (c) the disability arose out of coal mine employment.

> All three of these conditions of eligibility are presumed if the claimant was engaged in coal mine employment for at least 10 years and if the claimant meets one of the four medical requirements: (1) a chest X ray establishes the presence of pneumoconiosis . . .

Mullins Coal Co. v. Director, OWCP, U.S. Dep't of Labor, 484 U.S. 135, 141, 108 S.Ct. 427, 431, 98 L.Ed.2d 450 (1987) (footnote omitted); *see also* 20 C.F.R. §§ 718.303-05 (1992).

The ALJ utilized the true doubt rule to find that Ondecko does in fact suffer from pneumoconiosis and is totally disabled. The true doubt rule is a tool adopted by several courts to evaluate the evidence on the record as a whole:

> "[T]he factfinder operates under the statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee because the intent of the statute is to place the burden of possible error on those best able to bear it." *Noble Drilling Co. v. Drake,* 795 F.2d 478, 481 (5th Cir. 1986). In effect, the statute eases the ordinary preponderance of the evidence standard applicable in most civil suits. *Id.*

Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 90-91 (5th Cir. 1990); *see also Fidelity & Casualty Co. v. Burris,* 59 F.2d 1042, 1044 (D.C.Cir. 1932) ("Where there is doubt, it should be resolved in favor of the injured employee or his dependent family."); *Parsons Corp. of Cal. v. Director, OWCP, U.S. Dep't of Labor,* 619 F.2d 38, 41 (9th Cir. 1980); *Bath Iron Works Corp. v. White,* 584 F.2d 569 (1st Cir. 1978).[2]

[2] Most of the cases cited above regarding the evolution of the true doubt rule involve the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§ 901-50 (1982), rather than the Black Lung Benefits Act. *See supra* note 1.

The premise underlying the true doubt rule, originally put forth in *Burris,* is that compensatory statutes such as the Act should provide indemnity in cases of faultless injury at the worksite and therefore should be interpreted liberally in favor of the claimant. *Burris,* 59 F.2d at 1044. "Accidents in industry are inevitable, and the enactment of compensation laws grew out of a general recognition of a duty by society to an injured employee to secure his protection." *Id.*

Thus, the true doubt rule has become a shorthand and convenient method utilized by some courts and administrative agencies to allocate the ultimate burden of persuasion, i.e., the risk of non-persuasion, to the employer because it is the party best able to bear that risk.

Greenwich Collieries vigorously maintains that an ALJ may not resolve evidentiary conflicts in a claimant's favor when the evidence for and against entitlement under the Black Lung Benefits Act is found to be equally probative.

A. *The ALJ's use of the true doubt rule to find pneumoconiosis was improper according to Supreme Court precedent.*

Pursuant to regulations under the Act, there are four bases for determining the existence of pneumoconiosis in a living claimant. 20 C.F.R. § 718.202. The first basis, which is the one utilized by the ALJ in the case *sub judice,* requires a claimant to produce a qualifying X ray which establishes the presence of pneumoconiosis. 20 C.F.R. §§ 718.202(a)(1), 718.102.

The Supreme Court has decided that the X ray produced by the claimant may not merely "constitute evidence" of pneumoconiosis, but must show the presence of pneumoconiosis by a preponderance of the evidence.

Mullins, 484 U.S. at 138, 147-52, 108 S.Ct. at 429, 433-37; *Freeman United Coal Mining Co. v. OWCP*, 1993 WL 56178, 988 F.2d 706, 709 (7th Cir. 1993).[3]

Therefore, in this case, *Mullins* mandates that Ondecko's X ray must prove the existence of pneumoconiosis by a preponderance of the evidence. However, medical experts disagreed as to whether Ondecko's X ray established the presence of pneumoconiosis. The ALJ could not resolve this disagreement and found that there was true doubt as to whether Ondecko actually suffered from the ailment. Therefore, the ALJ did not find that Ondecko's X ray proved the existence of pneumoconiosis by a preponderance of the evidence; rather, she merely found the X ray and the accompanying medical readings created evidentiary equipoise as to the existence of pneumoconiosis. She then applied the true doubt rule to find in favor of Ondecko.

As discussed more thoroughly *infra*, a preponderance of the evidence is defined as:

> Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is evidence which as a whole shows that the fact sought to be proved is more probable than not.

Black's Law Dictionary 1182 (6th ed. 1990). The ALJ in this case found in favor of Ondecko, despite the fact that it was no more likely than not that he suffered from pneumoconiosis, in contravention of *Mullins*.

---

[3] The *Freeman* court went on to uphold the ALJ's use of the true doubt rule in that case. As discussed in detail, *infra*, we believe that this conclusion cannot follow. If a claimant must produce an X ray which proves the presence of pneumoconiosis by a preponderance of the evidence, then use of the true doubt rule is improper because it allows the claimant to prevail despite having failed to meet this burden.

B. *The true doubt rule generally contravenes the regulations under the Act and the APA.*

As discussed, *Mullins* precludes the ALJ's use of the true doubt rule to find the ultimate fact of the presence of pneumoconiosis pursuant to 20 C.F.R. section 718.202(a)(1). Further, if the presence of pneumoconiosis is not proved by a preponderance of the evidence, the presumption of causality upon which the ALJ relied in this case is improper, regardless of the length of the claimant's coal mine employment. These conclusions are sufficient to dispose of the present case. However, this section is necessary to show why the ALJ's use of the true doubt rule to find total disability was improper and also generally to explain why the use of the true doubt rule is not allowed in any case under the Act, whether or not a presumption is involved.

1. *The claimant bears the ultimate burden of persuasion.*

Traditionally, under our system of jurisprudence, both in the criminal and civil law, the ultimate burden of persuasion is placed on the accuser or claimant. *See generally* Vaughn C. Ball et al., *McCormick's Handbook on the Law of Evidence* § 337 (Edward W. Cleary ed., 2d ed. 1972). In criminal cases, those accused of crimes are presumed to be innocent unless proven guilty beyond a reasonable doubt. In civil cases when a party bears the burden of persuading the factfinder that the existence of a fact is more likely than not, if the factfinder cannot resolve the doubt regarding the existence of that fact, it must find in favor of the party who does not bear the burden of persuasion. It cannot be gainsaid that "[h]eed must be given to the burden of proof, at least when other tests are lacking." *Shapleigh v. Mier*, 299 U.S. 468, 475,

57 S.Ct. 261, 264, 81 L.Ed. 355 (1937) (Cardozo, J.). This fundamental principle is embodied in the Act, its regulations, and in Supreme Court precedent.

Black lung disability claims filed after March 31, 1980, are evaluated under the criteria established by section 718 of the permanent black lung regulations. *See Mullins,* 484 U.S. at 139, 108 S.Ct. at 429-30; *Director, OWCP, U.S. Dep't of Labor v. Mangifest,* 826 F.2d 1318, 1320-21 (3d Cir. 1987). Section 718 states in pertinent part:

> The burden of proving a fact alleged in connection with any provision of this part shall rest with the party making such allegations.

20 C.F.R. § 718.403 (1992).

The employer in this case contends that this language allocates the ultimate burden of persuasion to the claimant. *See Mangifest,* 826 F.2d at 1320 (miner must prove pneumoconiosis and total disability); *accord Robinson v. Pickands Mather & Co./Leslie Coal Co.,* 914 F.2d 35, 36 (4th Cir. 1990); *Lollar v. Alabama By-Products Corp.,* 893 F.2d 1258, 1262 (11th Cir. 1990). The claimant argues, however, that section 718 merely allocates the burden of coming forward with evidence to the claimant, and that the ultimate burden of persuasion rests with the employer. Therefore, contends Ondecko, the claimant sustains his burden upon establishing a *prima facie* case of his claims; it is the employer who must then prove non-entitlement by a preponderance of the evidence.

To bolster this argument, Ondecko points to the Supreme Court's decision in *N.L.R.B. v. Transportation Management Corp.,* 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983). In that case, the Supreme Court

stated that APA section 7(c)'s statement that the claimant bears the burden of proof "determines only the burden of going forward, not the burden of persuasion." *Transportation Management,* 462 U.S. at 403-04 n. 7, 103 S.Ct. at 2475-76 n. 7.

Ondecko's reliance on *Transportation Management,* however, is misplaced. Unfortunately, the etymology of the phrase "burden of proof" is such that the phrase can be used to mean solely the burden of persuasion, solely the burden of production, or both. *See, e.g., Northwestern Elec. Co. v. Federal Power Comm'n,* 134 F.2d 740, 743 (9th Cir. 1943); *Ambrose v. Wheatley,* 321 F.Supp. 1220, 1222 (D.Del. 1971); Vaughn C. Ball et al., *McCormick's Handbook on the Law of Evidence* § 336 (Edward W. Cleary ed., 2d ed. 1972). As recognized over 150 years ago, "[o]ne-half of the doubts in life arise from the defects of language," *Gibbons v. Ogden,* 22 U.S. (9 Wheat) 1, 232, 6 L.Ed. 23 (1824). Courts often must clarify the frequent confusion arising from the triad of meanings which can be ascribed to the phrase "burden of proof," as evinced by the Supreme Court's pronouncement pertaining to section 7(c) of the APA in *Transportation Management.*

However, the verb "prove," as used in section 718, is not subject to the same ambiguity as the phrase "burden of proof," as used in section 7(c) of the APA. When one must *prove* a given fact or issue, that person carries the *burden of persuasion* on that issue. "We think 'to prove her case' meant to prove the material allegation of her complaint, or each and every allegation in her complaint necessary to recover a judgment." *Taggert v. Scott,* 193 Ark. 930, 104 S.W.2d 816, 818 (1937). "To prove" means "to establish or make certain; to establish a fact or hypothesis as true by satisfactory and sufficient evi-

dence." *Lawson v. Superior Court,* 155 Cal.App.2d 755, 318 P.2d 812, 814 (1957); *accord Texas & New Orleans R.R. Co. v. Flowers,* 336 S.W.2d 907, 913-14 (1960); *Black's Law Dictionary* 1224 (6th ed. 1990).

The burden of persuasion is similarly defined as "the necessity of establishing a fact," in contrast to the burden of production, which is defined as "the necessity of making a *prima facie* showing." *Chesapeake & Potomac Tel. Co. v. Hicks,* 25 Md.App. 503, 337 A.2d 744, 756 (1975). Therefore the burden of production requires a party to *produce* evidence regarding a fact; the burden of persuasion requires a party to *prove* a fact. *See Hicks v. Feiock,* 485 U.S. 624, 637, 108 S.Ct. 1423, 1432, 99 L.Ed.2d 721 (1988) (emphasis supplied) (Supreme Court stated that a statute which required a criminal defendant to carry the *burden of persuasion* would be unconstitutional because it would "undercut the State's burden to *prove* guilt beyond a reasonable doubt."); *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 257-58, 101 S.Ct. 1089, 1095-96, 67 L.Ed.2d 207 (1981) (Burden of production requires party to articulate a reason for his actions while *burden of persuasion* requires a party to *prove* such reasons); *United States v. Liotard,* 817 F.2d 1074, 1077 (3d Cir. 1987), cited with approval in *United States* v. *Garcia,* 919 F.2d 881, 886 (3d Cir. 1990) (Government bears the *burden of persuasion* and therefore must *prove* its case by a preponderance of the evidence).

It is therefore of moment that section 718.403 does not contain the phrase "burden of proof." Rather, as stated above, that section states that "the burden of *proving* a fact alleged" rests with the claimant. 20 C.F.R. § 718.403 (1992) (emphasis supplied). Hence, although the meaning of the phrase "burden of proof" is subject to question, when a regulation provides that the claimant must *prove* the facts he alleges, and one of the facts he alleges

is the existence of pneumoconiosis, the claimant then bears the ultimate burden of persuasion regarding that fact. *See e.g., Mangifest* at 1320 (emphasis supplied) ("Under Part 718, the miner must *prove* that he has pneumoconiosis . . . and that he is totally disabled."). Thus, section 718 requires that the claimant prove pneumoconiosis, which means that he must establish the existence in fact of pneumoconiosis and therefore bears the burden of persuasion on that issue.[4]

We do not discount the humanitarian purposes of the Act. The legislature accomplished a significant objective in this regard, however, when it gave the claimant who meets certain criteria the benefit of a triple presumption of 1) the existence of pneumoconiosis, 2) that the pneumoconiosis resulted from coal mine employment, and 3) that the pneumoconiosis caused total disability. "But if a miner is not actually suffering from the type of ailment with which Congress was concerned, there is no justification for presuming that the miner is entitled to benefits." *Mullins,* 484 U.S. at 158, 108 S.Ct. 439-40.

Although we recognize that the Act should be construed liberally, that does not empower us to rewrite the provisions of the Act and its regulations requiring the claimant to prove the material allegations of his complaint. The reasoning of the court in *Pillsbury v. United Engineering Co.* is equally applicable to the case *sub judice*:

> We are aware that [the statute] is a humanitarian Act, and that it should be construed liberally to effectuate its purposes; but that does not give us the

[4] Because the Act's regulations place the burden of persuasion upon the claimant, we need not address the issue of whether section 7(c) of the APA, 5 U.S.C. section 556(d), similarly allocates that burden to the claimant.

> power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all.

342 U.S. 197, 200, 72 S.Ct. 223, 225, 96 L.Ed. 225 (1951).

2. *The APA and the Supreme Court have defined the burden of persuasion as preponderance of the evidence.*

Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a), incorporates Section 19(d) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 919(d), which in turn requires that any hearing under the Longshoremen's Act be conducted in accordance with the provisions of 5 U.S.C. section 554 of the APA. 20 C.F.R. § 725.452(a) (1992). This Court has acknowledged:

> The requirements of the Administrative Procedure Act (APA) are made applicable to the department of Labor Black Lung Adjudications by the Longshoremen's and Harbor Worker's Compensation Act. 33 U.S.C. § 919(d) (1982) as incorporated by 30 U.S.C. § 932(a) (1982).

North Am. Coal Co. v. Miller, 870 F.2d 948, 951 (3d Cir. 1989).

Section 7(c) of the APA provides in pertinent part:

> Except as other provided by statute, the proponent of a rule or order has the burden of proof. . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

5 U.S.C. § 556(d).

In 1981, the Supreme Court stated that "[t]he language of [section 7(c) of the APA] itself implies the enactment of a standard of proof, and that standard of proof is the preponderance of the evidence standard." *Steadman v. SEC,* 450 U.S. 91, 98, 102, 101 S.Ct. 999, 1006, 1008, 67 L.Ed.2d 69 (1981). Therefore, unless superseded by an express statutory provision,[5] the APA requires that the party who bears the ultimate burden of persuasion prove his case by a preponderance of the evidence.

3. *The true doubt rule impermissibly allows a claimant to prevail despite having failed to sustain his burden of persuasion by a preponderance of the evidence.*

A preponderance of the evidence is defined as:

> Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is evidence which as a whole shows that the fact sought to be proved is more probable than not.

Black's Law Dictionary 1182 (6th ed. 1990). Moreover, this court has recognized:

> [The fact-finder] must at least be convinced that the evidence considered as a whole, its "preponderance" to use the traditional term, indicates that the facts

[5] Section 12 of the APA, 5 U.S.C. § 559, allows for its authority to be superseded by express provisions in statutes. However, Greenwich is correct in stating that none of the following amount to an express statutory provision having the authority to supersede the APA on the issue of the degree of evidence which will satisfy the burden of persuasion: the legislative history to the Act, which clearly enunciates its humanitarian and remedial purpose, longstanding use of the true doubt rule by the Board, judicial acceptance of the true doubt rule, or Congressional acquiescence.

> asserted by the plaintiff are probably true. . . . *[I]f in their minds the probabilities of those facts being true or false appear equal the plaintiff has not met his burden of proof and a finding for the plaintiff would be inconsistent with the [fact finder's] duty to render a true verdict.*

Burch v. Reading Co., 240 F.2d 574, 579 (3d Cir. 1957) (emphasis added), *cert. denied*, 353 U.S. 965, 77 S.Ct. 1049, 1 L.Ed.2d 914 (1957); *accord Tigg Corp. v. Dow Corning Corp.*, 962 F.2d 1119, 1124 (3d Cir. 1992). Thus, a party proves a fact by a preponderance of the evidence when he proves that the fact's existence is more likely than not.

The true doubt rule, in contrast, is applicable only when the evidence on both sides of the issue is "equally probative."[6] Allowing a claimant, who bears the ultimate burden of persuasion, to prevail when the evidence is in equipoise is tantamount to allowing that claimant to prevail despite having failed to carry his burden by a preponderance of the evidence. As the Fifth Circuit has aptly and, for purposes of this case fatally, observed, "In effect, the [true doubt rule] eases the ordinary preponderance of the evidence standard applicable in most civil suits." *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88 (5th Cir. 1990).

However, as discussed above, the APA does not allow such an alleviation of the claimant's burden of persuasion. Hence, the use of the true doubt rule in cases under

[6] In *Provance v. United States Steel Corp.*, the Board determined that the claimant was not eligible to have the true doubt rule applied to his case because his evidence was not "equally probative" to that offered in opposition to his claim. *Provance v. United States Steel Corp.*, 1 Black Lung Rep. (MB) 1-483, 486 (1978).

the Act contravenes the APA as interpreted by the Supreme Court of the United States.

Therefore, Ondecko was required to prove by a preponderance of the evidence that he was entitled to benefits under the Act. The ALJ found that the evidence was in equipoise on the issues of pneumoconiosis and total disability, which, by definition, means that Ondecko did not carry his burden of proof by a preponderance of the evidence on these issues. The finding in his favor therefore was erroneous.

III. CONCLUSION

In sum, we hold that the use of the true doubt rule in the case *sub judice* contravenes *Mullins* because, in order to make use of the presumption involved in this case, a claimant's X ray must prove pneumoconiosis by a preponderance of the evidence. Moreover, the true doubt rule is contrary to Supreme Court precedent, the regulations under the Act, and the APA because (1) the claimant bears the ultimate burden of persuasion on the ultimate facts entitling him to benefits under the Act; (2) the APA and the Supreme Court have defined the ultimate burden of persuasion as a preponderance of the evidence; and (3) the true doubt rule would allow a claimant to prevail despite failing to prove entitlement by a preponderance of the evidence. Because there is no express provision in the Act which overrides the APA, the claimant must prove the existence of pneumoconiosis and total disability by a preponderance of the evidence.

It is not clear, however, whether the ALJ ever considered whether the claimant's evidence satisfied the preponderance standard. It appears that upon reaching what she believed to be the point of equipoise, and believing the true doubt rule to be applicable, the ALJ

may have halted her inquiry short of deciding whether Ondecko's evidence preponderated. We will therefore vacate the ALJ's Order and remand for further proceedings to allow the ALJ to make this determination. If the ALJ again concludes that the evidence is in equipoise, then Greenwich must prevail.

Accordingly, the decision and order of the Benefits Review Board will be vacated and the case remanded for further proceedings consistent with this opinion.

APPENDIX B

DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
800 K Street N.W.
Washington, D.C. 20001-8002

[SEAL]

BRB No. 90-2081 BLA
OWCP No. 198-20-7288

ANDREW ONDECKO, CLAIMANT-RESPONDENT

v.

GREENWICH COLLIERIES, EMPLOYER-PETITIONER

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PARTY-IN-INTEREST

Date Issued: March 18, 1992

DECISION and ORDER

Appeal of the Decision and Order of Joan Huddy Rosenzweig, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Creany & Tulowitzki), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and LIPSON, Administrative Law Judge.*

* Sitting as a temporary Board member by designation pursuant to the Longshore and Habor Workers' Compensation Act as amended in 1984, 33 U.S.C. § 921(b)(5) (Supp. V 1987).

PER CURIAM:

Employer appeals the Decision and Order (89-BLA-2019) of Administrative Law Judge Joan Huddy Rosenzweig, awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). The administrative law judge found that the parties stipulated to thirty-one years of qualifying coal mine employment, Decision and Order at 3; *see* Hearing Transcript at 6, and, applying the regulations at 20 C.F.R. Pt. 718, found that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(1), Decision and Order at 14, that claimant's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b), Decision and Order at 15, and that claimant is totally disabled by pneumoconiosis, Decision and Order at 17. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established at Section 718.202(a)(1), and in failing to weigh the evidence under 20 C.F.R. § 718.204(c). Claimant[1] responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, did not file a brief in this appeal.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence,

[1] Claimant is Andrew Ondecko, the miner, who filed his claim for benefits on January 31, 1989. Decision and Order at 3; Director's Exhibit 1.

[2] Inasmuch as no challenge is made to the administrative law judge's findings regarding the length of coal mine employment and Sections 718.203(b) and 718.204(c)(2), (3), they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first argues that the administrative law judge misapplied the true-doubt rule[3] pursuant to Section 718.202(a)(1), in that she credited the only physician who interpreted x-rays as positive for the existence of pneumoconiosis while disregarding the more numerous negative interpretations of both employer's and the Director's physicians, Employers' Brief at 4. Employer further argues that the administrative law judge's true-doubt analysis is insufficient under the Administrative Procedure Act (APA), because it relieves claimant of his burden of proof. Employer's Brief at 5-6.

An administrative law judge is not required to accept as conclusive the numerical superiority of x-ray interpretations. *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990). Additionally, inasmuch as negative readings are not a trustworthy indicator of the absence of pneumoconiosis, *see Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), the administrative law judge properly credited the positive readings, *see Tokarcik v. Consolidation Coal Co.*, 6 BLR 1-

[3] The true-doubt rule is an evidentiary rule applicable to the administrative law judge's conclusion concerning the weight of the evidence. "True doubt" is said to arise only when equally probative but contradictory evidence is presented in the record, where selection of one set of facts would resolve the case against claimant, but selection of the contrary set of facts would resolve the case for claimant. *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

666 (1983), and determined that "at least one Board-certified radiologist and B-reader[4] repeatedly found evidence of pneumoconiosis significant enough to raise true doubt on the issue of pneumoconiosis notwithstanding the number of negative interpretations." Decision and Order at 14. Thus, since the administrative law judge found the positive and negative interpretations by physicians who were board-certified/B-readers to be equally probative, true doubt existed which must be resolved in favor of claimant. Decision and Order at 8; *see Wilt, supra; Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Moreover, we hold that the administrative law judge's findings pursuant to Section 718.202(a)(1) are in compliance with the Administrative Procedure Act inasmuch as she properly discussed and weighed all relevant medical evidence. *See* 5 U.S.C. § 557(c)(3)(A), as incorporated into the Act by 5 U.S.C. § 554(c)(2), 33 U.S.C. § 919(d) and 30 U.S.C. § 932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Therefore, we affirm the administrative law judge's finding that pneumoconiosis has been established pursuant to Section 718.202(a)(1).

Pursuant to Section 718.204(c), employer argues that the administrative law judge erred in crediting Dr. Dandrea because his report is not reasoned, and in applying the true-doubt rule to the medical opinion

[4] A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 20 C.F.R. § 718.202(a)(1)(ii)(E); 42 C.F.R. § 37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-16 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

evidence because claimant must establish total respiratory disability by a preponderance of the evidence. Employer's Brief at 7. In finding claimant totally disabled by pneumoconiosis, the administrative law judge noted that of the eight physicians of record, the reports of Drs. Ignacio, Dandrea, Sabo, and Malhotra "support the conclusion that claimant is disabled by pneumoconiosis," while those of Drs. Pickerill, Begley, Strother, and Fino concluded that claimant did not have pneumoconiosis and was not totally disabled from a pulmonary standpoint. While recognizing that the latter four physicians are "highly qualified Board-certified pulmonary specialists," the administrative law judge gave "special consideration" to Dr. Dandrea, who has been claimant's treating physician for more than twenty years. Decision and Order at 16; *Ondecko v. Director, OWCP*, 14 BLR 1-2 (1989). Noting that "it remained Dr. Dandrea's opinion based on his observation of the Claimant over the years that the Claimant is totally disabled by coal workers' pneumoconiosis and chronic obstructive pulmonary disease," the administrative law judge found "the fact that the Claimant's treating physician considers him totally disabled to raise true doubt in face of the Employer's experts[']' opinions." Decision and Order at 16-17. Resolving her finding of true doubt in favor of claimant, the administrative law judge concluded that "Claimant has proved that he is totally disabled by pneumoconiosis." *Id.; Wilt, supra; Clark, supra; Kozele, supra.*

To establish that claimant is totally disabled due to pneumoconiosis the administrative law judge must discuss all of the evidence of record and, if she determines that the record contains contrary probative evidence, she must the assign such evidence appropriate weight

and determine whether it outweighs the evidence supportive of a finding of total respiratory disability. *See Clark, supra; Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*). The existence of contrary probative evidence in the record does not preclude evidence supportive of a claim from being sufficient to establish total disability since all relevant evidence must be weighed. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Mazgaj v. Valley Camp Coal Corp.*, 9 BLR 1-201 (1986).

Here, while the administrative law judge failed to make specific findings pursuant to Sections 718.204(b), (c), she stated her basis for finding the evidence equally probative, Decision and Order at 12-13, and her discussion of the medical evidence of record supports the inference that she considered the contrary probative evidence and found it outweighed by Dr. Dandrea's opinion as corroborated by those of Drs. Ignacio, Sabo, and Malhotra. *See* Decision and Order at 7-13; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *see also Estep v. Director, OWCP*, 7 BLR 1-904 (1984); *Fuller v. Gilbralter Coal Corp.*, 6 BLR 1-1291 (1984). Inasmuch as the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), we hold that the administrative law judge properly considered the contrary probative evidence, *see Rafferty, supra; Shedlock, supra; see also Kuchwara, supra; Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983), and affirm her conclusion that

claimant has established total respiratory disability due to pneumoconiosis pursuant to Section 718.204(b), (c),[5] *see Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989); *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990) (*en banc*).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals Judge

/s/ Sheldon R. Lipson
SHELDON R. LIPSON
Administrative Law Judge

[5] The presumption contained in Section 411(c)(4) of the Act, 30 U.S.C. § 921(c)(4), as implemented by Section 718.305, is not applicable as this claim was filed after January 1, 1982. *See* Director's Exhibit 1; 20 C.F.R. § 718.305(e).

APPENDIX C

U.S. DEPARTMENT OF LABOR [SEAL]
Office of Administrative Law Judges
Seven Parkway Center
Pittsburgh, Pennsylvania 15220

CASE NO. 89- BLA-2019
OWCP NO. 198-20-7288

IN THE MATTER OF
ANDREW ONDECKO, CLAIMANT

v.

GREENWICH COLLIERIES AND PENNSYLVANIA LIGHT AND POWER, EMPLOYER

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,[1] PARTY-IN-INTEREST

Date Issued: August 3, 1990

APPEARANCES:

Robert J. Bilonick, Esq. for the Claimant

Thomas A. Aurandt, Esq. for the Employer

Before: Joan Huddy Rosenzweig, Administrative Law Judge

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[1] No appearance was entered on behalf of the Director, Office of Workers' Compensation Programs (Tr. 5).

DECISION AND ORDER—AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, as amended, 30 U.S.C. Section 901 *et seq.*

On August 16, 1989, the Director, Office of Workers' Compensation Programs, referred this case to the Office of Administrative Law Judges for a formal hearing (Dir. Ex. 46).[2] I held a hearing in this matter on March 5, 1990 in Pittsburgh, Pennsylvania.[3] All parties were afforded full opportunity to present evidence and to examine and cross-examine witnesses as provided in the Act and applicable regulations.[4]

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[2] "Dir. Ex." refers to the Director's exhibits; "Er. Ex." refers to the Employer's exhibits; "Cl. Ex." refers to the Claimant's exhibits; "ALJ Ex." refers to the Administrative Law Judge exhibits; and "Tr." refers to the official transcript of this proceeding.

[3] The record was held open until May 1, 1990 to allow both parties to submit x-ray rereadings (Tr. 8-10; 28-29). By letter dated April 4, 1990 the Claimant submitted: (1) Dr. K. N. Mathur's March 19, 1990 interpretation of the Claimant's January 12, 1990 chest x-ray and Dr. Mathur's curriculum vitae; and (2) Dr. K. N. Mathur's March 26, 1990 interpretation of the Claimant's January 31, 1990 chest x-ray and again Dr. Mathur's curriculum vitae. These documents are identified as Claimant's Exhibits 6 and 7 respectively and are received into evidence. By letter dated April 20, 1990 the Employer submitted: (1) Dr. Patrick W. Wolfe's March 13, 1990 interpretation of the Claimant's January 31, 1990 chest x-ray; (2) Dr. William E. Palmer's March 14, 1990 interpretation of the Claimant's January 12, 1990 and January 31, 1990 chest x-rays; and (3) Dr. Fino's March 16, 1990 interpretation of the Claimant's January 12, 1990 chest x-ray. These documents are identified as Employer's Exhibits 22-24 respectively and are received into evidence. The Employer submitted a closing statement May 7, 1990 (see Tr. 32); it is considered the Claimant was also given the opportunity to respond to the Employer's closing remarks (Tr. 32); no response was received.

[4] *See* Title 20 of the Code of Federal Regulations. Regulation section numbers cited in this Decision and Order refer to sections of that title.

The issues before me are:

1. Whether the Claimant worked at least 30-1/2 years in or around one or more coal mines;

2. Whether the Claimant has pneumoconiosis as defined in the Act and regulations;

3. Whether the Claimant's pneumoconiosis arose out of coal mine employment;

4. Whether the Claimant is totally disabled; and

5. Whether the Claimant's disability is due to pneumoconiosis (Dir. Ex. 46; Tr. 6).[5]

Based on witness testimony and on a thorough analysis of the entire record with due consideration accorded to the parties' arguments, applicable statutory provisions, regulations, and relevant case law, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Claimant was born March 31, 1927 (Dir. Ex. 1; Tr. 10). The parties present at the hearing stipulated that the Claimant has 31 years of qualifying coal mine employment (Tr. 6); this is supported by the record (Dir. Ex. 2, 4-14). The Claimant ceased working in the mines January 4, 1989 (Tr. 11). He filed for Black Lung Benefits January 31, 1989 (Dir. Ex. 1). His wife Rose, whom he married in 1952, is his only dependent (Dir. Ex. 1, 15, Tr. 10-11).

[5] Issues 1 through 5 were contested by the Director (Dir. Ex. 46). Issues 2 through 5 were contested by the Employer (Dir. Ex. 46). The Employer also raised the "other issue": "Claimant is not a working miner, although he reserves Sickness and Accident Benefits which began on January 11, 1989[.]" *See* Dir. Ex. 46.

Medical Evidence

X-ray Evidence

Ex. No.	*X-ray Date*	*Reading Date*	*Physician and Qualifications*[6]
Dir. Ex. 26	10-12-76	10-12-76	Hurst
Impression: pneumoconiosis			
Er. Ex. 1	10-12-76	9-1-89	Wolfe, BCR, B
Impression: 0/0			
Er. Ex. 2	10-12-76	9-21-89	Palmer, BCR, B
Impression: completely negative			
Dir. Ex. 27	2-24-81	2-25-81	Rice, BCR
Impression: pneumoconiosis			
Er. Ex. 1	2-24-81	9-1-89	Wolfe, BCR, B
Impression: 0/0			
Er. Ex. 2	2-24-81	9-21-89	Palmer, BCR, B
Impression: completely negative			
Dir. Ex. 28	12-29-81	12-29-81	Rice, BCR
Impression: mild fibrosis			
Er. Ex. 1	12-29-81	9-1-89	Wolfe, BCR, B
Impression: 0/0			
Er. Ex. 2	12-29-81	9-21-89	Palmer, BCR, B
Impression: completely negative			
Er. Ex. 1	12-29-82	9-1-89	Wolfe, BCR, B
Impression: 0/0			
Er. Ex. 2	12-29-82	9-21-89	Palmer, BCR, B
Impression: completely negative			

[6] The following abbreviations designate the physicians' radiological qualifications:

BCR—Board-certified Radiologist
A—A-reader
B—B-reader
— —Indicates fact is unknown

Ex. No.	*X-ray Date*	*Reading Date*	*Physician and Qualifications*[6]
Er. Ex. 7	3-27-83	10-20-89	Palmer, BCR, B
Impression: no parenchymal abnormalities consistent with pneumoconiosis noted; but pleural abnormalities consistent with pneumoconiosis are noted			
Er. Ex. 8	3-27-83	10-17-89	Wolfe, BCR, B
Impression: 0/0			
Dir. Ex. 29	2-12-86	2-13-86	Rice, BCR
Impression: mild fibrosis			
Er. Ex. 1	2-12-86	9-1-89	Wolfe, BCR, B
Impression: 0/0			
Er. Ex. 2	2-12-86	9-21-89	Palmer, BCR, B
Impression: no abnormalities consistent with pneumoconiosis			
Dir. Ex. 30	12-28-88	12-29-88	Rice, BCR
Impression: minimal fibrotic changes			
Er. Ex. 1	12-28-88	9-1-89	Wolfe, BCR, B
Impression: 0/0			
Er. Ex. 2	12-28-89	9-4-89	Palmer, BCR, B
Impression: completely negative			
Er. Ex. 7	2-20-89	10-20-89	Palmer, BCR, B
Impression: no abnormalities consistent with pneumoconiosis			
Er. Ex. 8	2-20-89	10-17-89	Wolfe, BCR, B
Impression: 0/0			
Cl. Ex. 2	2-20-89	9-21-89	Mathur, BCR, B
Impression: 1/1 p s			
Dir. Ex. 25	2-21-89	2-22-89	Rice, BCR
31 Impression: 0/1 q q			
Dir. Ex. 24	2-21-89	4-3-89	Sargent, BCR, B
Impression: no abnormalities consistent with pneumoconiosis			

Ex. No.	*X-ray Date*	*Reading Date*	*Physician and Qualifications*[6]
Er. Ex. 9	2-21-89	11-7-89	Wolfe, BCR, B
Impression: 0/0			
Er. Ex. 10	2-21-89	11-14-89	Palmer, BCR, B
Impression: no abnormalities consistent with pneumoconiosis			
Dir. Ex. 43	4-17-89	4-17-89	Pickerill, B
Impression: 0/0			
Dir. Ex. 43	4-17-89	4-19-89	Patterson, BCR, B
Impression: 0/0			
Cl. Ex. 5	4-17-89	2-9-90	Mathur, BCR, B
Impression: 2/1 s t			
Er. Ex. 6	9-28-89	9-28-89	Begley, —
Impression: no pneumoconiosis			
Er. Ex. 7	9-28-89	10-20-89	Palmer, BCR, B
Impression: no parenchymal abnormalities consistent with pneumoconiosis; but pleural abnormalities consistent with pneumoconiosis are noted			
Er. Ex. 8	9-28-89	10-17-89	Wolfe, BCR, B
Impression: 0/0			
Cl. Ex. 4	10-23-89	10-24-89	Rice, BCR
Impression: 0/1 q q			
Er. Ex. 16	10-23-89	1-25-89	Wolfe, BCR, B
Impression: 0/0			
Er. Ex. 17	10-23-89	2-5-90	Palmer, BCR, B
Impression: no abnormalities consistent with pneumoconiosis			
Cl. Ex. 3	10-23-89	1-6-90	Mathur, BCR, B
3 Impression: 1/1 p s			
Er. Ex. 14	1-12-90	1-12-90	Wolfe, BCR, B
Impression: 0/0			

Ex. No.	*X-ray Date*	*Reading Date*	*Physician and Qualifications*[6]
Er. Ex. 23	1-12-90	3-14-90	Palmer, BCR, B
Impression: no abnormalities consistent with pneumoconiosis			
Er. Ex. 24	1-12-90	3-16-90	Fino, B
Impression: completely negative			
Cl. Ex. 6	1-12-90	3-19-90	Mathur, BCR, B
Impression: 1/2 p s			
Er. Ex. 18	1-31-90	1-31-90	Fino, B
Impression: 0/0			
Er. Ex. 22	1-31-90	3-13-90	Wolfe, BCR, B
Impression: 0/0 for small opacities (no parenchymal abnormalities consistent with pneumoconiosis; plural abnormalities consistent with pneumoconiosis are noted)			
Er. Ex. 23	1-31-90	3-14-90	Palmer, BCR, B
Impression: no abnormalities consistent with pneumoconiosis			
Cl. Ex. 7	1-31-90	3-26-90	Mathur, BCR, B
Impression: 1/1 t s			

Pulmonary Function Study Evidence

Ex. No.	Date	Physician	Age	Hgt	FEV1	MVV	FVC	FEV1 FVC	Cooperation & Understanding
Dir. Ex. 17	12-29-81	Krumholz	54	66"	2.51	60	3.51	72%	—
Interpretation: mild obstructive pulmonary disease, *see* reviews of Board-certified pulmonary specialists Drs. Fine [*sic*], Solic and Pickerill (Er. Ex. 3-5)									
Dir. Ex. 18	4-1-82	Krumholz	55	66"	2.60	85	3.62	72%	—
Interpretation: mild to moderate obstructive pulmonary disease consistent with emphysema and bronchitis[;] *see* also reviews of Drs. Fino, Solic, and Pickerill (Er. Ex. 3-5)									
Dir. Ex. 19	12-28-88	Ignacio	61	66"	2.62	—	3.83	68%	good
					2.77	—	4.02	69%	
Interpretation: no restrictive/obstructive disease; severe small airways disease, *see* also reviews at Er. Ex. 3-5									
Dir. Ex. 20	2-21-89	Ignacio	61	66"	2.69	75.89	3.42	79%	good
Interpretation: normal spirometry; no restrictive/obstructive defect									
Dir. Ex. 43	4-17-89	Pickerill	62	64"	2.51	97.81	3.58	70%	fair
					2.75	104.60	3.78	73%	
Interpretation: mild obstructive impairment; no restriction; normal MVV									

Ex. No.	Date	Physician	Age	Hgt	FEV1	MVV	FVC	FEV1 FVC	Cooperation & Understanding
Er. Ex. 6	9-28-89	Begley	62	65"	2.25	80.2	2.84	79%	good
					2.48	93.9	3.49	71%	
Interpretation: obstructive disease of the small airways									
Cl. Ex. 4	11-2-89	Malhotra	62	64"	2.50	112	3.60	69%	
Interpretation: moderate small airway disease, *see* reviews by Board-certified pulmonary specialists Drs. Pickerill, Solic, Fino (Er. Ex. 11-13)									
Er. Ex. 15	1-12-90	Strother	62	65"	2.83	115	4.03	70%	suitable
Interpretation: normal lung function tests									
Er. Ex. 18	1-31-90	Fino	62	64"	2.79	89	4.10	68%	
					2.70	102	3.87	69%	
Interpretation: minimal obstruction of no clinical significance									
Er. Ex. 14	2-1-90	Strother	62	65"	2.82	109	3.99	71%	suitable
Interpretation: normal lung function tests									

Blood Gas Studies

Ex. No.	*Date*	*Physician*	*PCO2*	*PO2*	*Interpretation*
Dir. Ex. 23	2-21-89	Miner's Hospital	37 39	89 90	—
Dir. Ex. 43	4-17-89	Pickerill	35.9	74.6	normal but for mild reduction in PO2
Er. Ex. 6	9-28-89	Begley	30 41	88 87	normal
Er. Ex. 18	1-31-90	Fino	42.5	78.3	normal
Er. Ex. 14	2-1-90	Strother	40 43	68 71	PO2 mild reduced at rest

Other Relevant Evidence

Director's Exhibit 21 contains records of examinations and testing performed at the Coal Workers' Clinic of Miner's Hospital of Northern Cambria dating from 1981 to 1989. (*See also* Cl. Ex. 1; Dir. Ex. 17-19). Per Dr. G. V. Ignacio pneumoconiosis and chronic obstructive pulmonary disease were diagnosed and bronchodilators were prescribed; the Claimant's level of functioning was characterized as minimal or moderately restricted to markedly restricted.

Dr. Sabo submitted a report dated February 20, 1989 (Dir. Ex. 22). The Claimant's work history, medical history, symptoms, and the results of the Claimant's

physical examination, chest x-ray, pulmonary function study and blood gas study were listed (*See* Dir. Ex. 20, 23, 25). Chronic obstructive pulmonary disease with pneumoconiosis due to coal dust exposure and chronic bronchitis secondary to cigarettes were diagnosed. Dr. Sabo assessed the Claimant's degree of impairment as 90% due to chronic obstructive pulmonary disease with pneumoconiosis related to coal dust exposure and 10% due to chronic bronchitis secondary to cigarettes.

Dr. Robert C. Pickerill examined the Claimant April 17, 1989 (Dir. Ex. 43). He discussed the Claimant's work history, symptoms, medical history, and the results of a physical examination, blood gas study, pulmonary function study, electrocardiogram and chest x-ray. Dr. Pickerill's diagnoses were:

1. No radiographic evidence of coal workers' pneumoconiosis.
2. Chronic bronchitis based upon subjective symptoms of chronic productive cough.
3. Mild chronic obstructive pulmonary disease (COPD) based upon minor abnormalities on pulmonary function testing and a history of treatment with Theolair.

Dr. Pickerill stated that the Claimant does not have definite medical evidence of coal workers' pneumoconiosis. He found the Claimant's mild chronic obstructive pulmonary disease and chronic bronchitis are most likely due to his previous tobacco smoking, but symptoms of chronic bronchitis can be exacerbated by dust exposure.

Based upon his examination and testing of the Claimant, however, Dr. Pickerill concluded that the mild chronic obstructive pulmonary disease and chronic bronchitis have not resulted in a significant functional respiratory impairment which would be severe enough to

prevent him from doing the physical requirements of his last job as a pipeman in the coal mining industry.

Dr. Raymond L. Dandrea submitted a report dated July 24, 1989 (Cl. Ex. 1). He stated that he has been the Claimant's family physician for over 20 years and that the claimant has been evaluated annually at the Coal Workers' Respiratory Clinic since 1981. *See* Clinic notes at Dir. Ex. 21, discussed *supra; see* also Dir. Ex. 17-19. Dr. Dandrea stated that the Claimant had been complaining of an occasional cough and increasing shortness of breath with exertion for the past 15 years and in August 1988 complained that it reached the point that he was short of breath doing normal work activities and simple activities around the house as well as experiencing occasional chest pain. Despite treatment with Theophylline Compounds, which the Claimant had been prescribed for seven to eight years, the Claimant's symptoms progressed to the point that he could no longer do his job and stopped working January 1989 on Dr. Dandrea's advice. Dr. Dandrea referred to the Clinic notes at Dir. Ex. 21 and stated that he agreed with the clinic physicians. Dr. Dandrea stated that it has been his opinion that the Claimant is suffering from coal workers' pneumoconiosis and chronic obstructive pulmonary disease which are the direct result of his exposure to the coal dust in his years of coal mine employment and that he feels the Claimant has been totally disabled from further work in the coal mines as he advised the Claimant in January 1989. Dr. Dandrea continues to prescribe Theophylline Compound, Theodur, to the Claimant.

Dr. Christopher J. Begley examined the Claimant September 28, 1989 (Er. Ex. 6). Based on the Claimant's medical history, work history, symptoms, and the results of a physical examination, chest x-ray, blood gas study, electrocardiogram and pulmonary function study,

Dr. Begley's impressions were:

1. Obstructive disease of the small airways
2. History of smoking

It was Dr. Begley's opinion that the Claimant is not suffering from an occupational pneumoconiosis or any other occupational lung disease and that the Claimant would be capable of returning to his previous employment in the coal mines. Dr. Begley found that the Claimant's obstructive disease of the small airway is non disabling and is a direct consequence of his long history of cigarette smoking.

Dr. Vijay K. Malhotra examined the Claimant November 2, 1989 (Cl. Ex. 4). He discussed the Claimant's symptoms, work history, medical history, and the results of an electrocardiogram, chest x-ray, and pulmonary function study. Dr. Malhotra's impression was simple coal workers' pneumoconiosis, type q, profusion 0/1, involving all six zones. Dr. Malhotra stated that the Claimant developed pneumoconiosis as a result of his exposure of coal dust in his job and that a pulmonary disability is present. He considered the Claimant totally disabled from performing his coal mine work or labor of a similar nature.

Dr. Begley was deposed January 9, 1990 (Er. Ex. 19). He discussed his September 28, 1989 examination and testing of the Claimant and review of the Claimant's medical records. He repeated his conclusion that the Claimant is not suffering from pneumoconiosis or any other occupational lung disease and is capable from a pulmonary standpoint of performing his job of a pipeman. He stated that he found evidence of obstructive disease of the small airways, but explained that it was non-disabling and a consequence of cigarette smoking. His opinion was not changed by his review of the other

medical evidence asserting total disability due to pneumoconiosis.

Dr. George W. Strother examined the Claimant January 12, 1990 (Er. Ex. 14). His report concluded the Claimant's work history, medical history, symptoms, and the results of a physical examination, chest x-ray, pulmonary function study and blood gas study. Dr. Strother diagnosed:

1. Chronic bronchitis based on related history of daily cough productive of sputum for 5 years.
2. Mild hypertension based on recorded blood pressures.

Dr. Strother concluded that he found no evidence of dust pneumoconiosis or pulmonary impairment and that the Claimant is able to do his usual coal mine work based on normal pulmonary reserve and capacity. Dr. Strother reviewed other evidence of record including Drs. Dandrea's and Malhotra's reports and the coal workers' clinic records; his opinion was not changed.

Dr. Gregory J. Fino examined the Claimant January 31, 1990 (Er. Ex. 18). He discussed the Claimant's symptoms, medical history, work history, as well as the results of a physical examination, chest x-ray, pulmonary function study, blood gas study and electrocardiogram. He also reviewed the other medical evidence in the record. Dr. Fino's conclusions were:

1. There is insufficient objective medical evidence to justify a diagnosis of simple coal workers' pneumoconiosis.
2. It is my opinion that this man does not suffer an occupationally-acquired pulmonary disease.
3. There is clinically insignificant respiratory impairment related to cigarette smoking and tobacco use present.

4. From a respiratory standpoint this man is neither partially nor totally disabled from returning to his last mining job, or a job requiring similar effort.

Dr. Strother was deposed February 6, 1990 (Er. Ex. 20). He discussed his January 12, 1990 examination and testing of the Claimant and review of the medical evidence. He repeated that it was his opinion that the Claimant does not have coal workers' pneumoconiosis or a pulmonary impairment and from a pulmonary standpoint could perform his last duties of a pipeman. He explained that two pulmonary function studies were conducted (January 12, 1990 and February 1, 1990) because on January 12, 1990 Theolair was taken four hours before testing and February 1, 1990 it was taken 16 hours before testing; he found no fundamental difference in the test results (both were normal).

Dr. Dandrea was deposed February 15, 1990 (Er. Ex. 21). He repeated that he had been the Claimant's family physician for over 20 years and stated that he felt it would be in the Claimant's best interest to quit working in January 1989 because of pulmonary disease. He cited findings on physical examination, chest x-ray interpretations from the coal workers' clinic, and the results of a two-step exercise test as support for his opinion. Dr. Dandrea acknowledged that the pulmonary function studies and chest x-rays performed at the clinic did not show a progression of any disease process but noted that over the years the Claimant reported his decreased ability to do work at the mine or at home due to shortness of breath and that he felt the Claimant definitely showed a decreased exercise tolerance. Dr. Dandrea recognized that aging generally can be a factor in one's decreased ability to perform a task but that he would not

expect it to be that marked at the Claimant's age and acknowledged that the Claimant has also suffered bouts of arthritis, bursitis, numbness, back pain, and heel pain. Dr. Dandrea agreed that the results of the Claimant's pulmonary function studies did not support a finding of diability from a pulmonary standpoint but stated that he relied on the fact that the Claimant was unable to do what he had done in previous years citing the results of a two-step exercise test. Dr. Dandrea agreed that the treadmill test performed by Dr. Strother one year later, January 1990, produced normal results. With regard to a possible heart problem, Dr. Dandrea stated that the Claimant's electrocardiograms were repeatedly normal. (*Cf.* Dr. Fino's findings at Er. Ex. 18). With regard to his prescription of Theodur, Dr. Dandrea reported that the Claimant noted definite improvement with his breathing with it and denied Dr. Strother's assertion that the drug had a placebo-like effect on the Claimant. *See* Dr. Strother's report (Er. Ex. 14) and deposition (Er. Ex. 20). Dr. Dandrea stated that it remained his opinion that the Claimant is suffering from coal workers' pneumoconiosis and chronic obstructive pulmonary disease resulting from coal dust exposure and that the Claimant is totally disabled from further coal mine work. Dr. Dandrea stated that smoking may partially contribute to the Claimant's chronic obstructive pulmonary disease and that both the coal workers' pneumoconiosis and chronic obstructive pulmonary disease contributed to the Claimant's disability. Dr. Dandrea admitted that to some extent his telling the Claimant not to do coal mine work is a prophylactic restriction because to continue to work may have put the Claimant in a severe pulmonary state.

Applicable Regulations

As the Claimant filed his application for benefits on January 31, 1989, the amended regulations at Part 718 are applicable. These regulations require that the Claimant prove: (1) the existence of pneumoconiosis; (2) that the disease arose from coal mine employment; and (3) that he is totally disabled as a result of the disease. *Perry v. Director, OWCP,* 9 BLR 1-1 (1986).

Pneumoconiosis

Section 718.202 provides that the existence of pneumoconiosis can be established by x-ray;[7] autopsy or biopsy; by the presumptions contained in §§ 718.304, 718.305, or 718.306; or by the report of a physician exercising sound medical judgment stating that the Claimant suffers from pneumoconiosis.

There are 44 x-ray interpretations in the record. When x-ray readings are conflicting, as they are in the instant case, the readers' radiological qualifications must be considered under § 718.202(a)(1). Readers who are both Board-certified in radiology and National Institute of Occupational Safety and Health certified B-readers are considered the most qualified. *Roberts v. Bethlehem Mines Corp.,* 8 BLR 1-211 (1985). Here there are a total of 33 x-ray interpretations offered by Drs. Wolfe, Palmer, Mathur, Sargent, and Patterson, all Board-certified radiologists and B-readers. I note that there is disagreement among these expert readers as to the existence of pneumoconiosis. Dr. Mathur read five of the Claimant's

[7] A chest x-ray classified as Category 1, 2, 3, A, B, or C establishes the existence of pneumoconiosis. A chest x-ray classified as Category 0, including the subcategories 0/-, 0/0, or 0/1, is not accepted as evidence of pneumoconiosis. *See* § 718.102(b).

x-rays, including the more recent 1990 x-rays, as positive for pneumoconiosis. I note that each of Dr. Mathur's positive readings was countered by two equally-qualified readers' interpretation of the x-ray as negative.[8] However, I am not impressed or persuaded by the fact that the Employer was able to produce a greater number of negative interpretations.[9] I find the fact that at least one Board-certified radiologist and B-reader repeatedly found evidence of pneumoconiosis significant enough to raise true doubt on the issue of pneumoconiosis notwithstanding the number of negative interpretations. True doubt is to be resolved in favor of the Claimant. *Provance v. United States Steel Corporation,* 1 BLR 1-483 (1978).

The Claimant has proved the existence of pneumoconiosis.

Causation

Section 718.203 provides: "In order for a claimant to be found eligible for benefits under the Act, it must be determined that the miner's pneumoconiosis arose at least in part out of coal mine employment." Subsection

[8] I note that on their x-ray classification forms Dr. Palmer in two instances and Dr. Wolfe in one instance found no parenchymal abnormalities consistent with pneumoconiosis but indicated "yes" there were pleural abnormalities consistent with pneumoconiosis. I do not consider the notation of pleural abnormalities alone sufficient to establish pneumoconiosis. The regulations speak of establishing pneumoconiosis by opacities (parenchymal abnormalities). *See* 718.102(b), footnote 7 *supra; see* also Dr. Wolfe's cover letter associated with Er. Ex. 22.

[9] The process of weighing the x-ray evidence involves more than counting the number of positive versus negative readings.

It is important to keep in mind the remedial nature of the Act. It was designed to be liberally construed as a health and safety statute.

(b) specifies: "If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be rebuttable presumption that the pneumoconiosis arose out of such employment."

It is presumed that the Claimant's pneumoconiosis arose out of his coal mine employment. There was no evidence offered to establish that the pneumoconiosis arose out of a cause other than coal mine employment. The § 718.203(b) presumption is not rebutted.

The Claimant has proved that his pneumoconiosis arose out of coal mine employment.

Total Disability

Section 718.204 provides that total disability may be established in a living miner's claim by pulmonary function study evidence; arterial blood gas study evidence; evidence of cor pulmonale; or by the opinion of a physician which concludes that a miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work[10] or comparable and gainful work. *See* § 718.204(c)(1) through (c)(4).

None of the blood gas studies produced values indicative of total disability.

[10] Usual coal mine employment is defined as the most recent job a miner performed regularly and over a substantial period of time. *Daft v. Badger Coal Co.*, 7 BLR 1-124 (1984). The Claimant testified that he worked his last five to six years at Greenwich Collieries as a pipeman (Tr. 13-14; *see also* Dir. Ex. 14). As a pipeman the Claimant moved, dismantled, and assembled pipes in various parts of the mine including along the beltline, waterpumps (Tr. 13; Dir. Ex. 14). Physically, this job required the Claimant to be constantly dragging pipe weighing up to 150 to 200 pounds (Tr. 13-14; Dir. Ex. 14).

There is no evidence in the record to suggest the Claimant suffers from cor pulmonale.

Finally, there are the opinions of eight physicians in the record. Drs. Ignacio's, Dandrea's, Sabo's and Malhotra's reports support the conclusion that the Claimant is disabled by pneumoconiosis.[11] Drs. Pickerill's, Begley's, Strother's and Fino's reports support the conclusion that the Claimant is not totally disabled due to pneumoconiosis; indeed, they do not find the Claimant to have pneumoconiosis or be disabled from a pulmonary standpoint.[12]

I recognize that Drs. Pickerill, Begley, Strother and Fino are highly-qualified Board-certified pulmonary specialists and that their opinions warrant special consideration on that basis. I must also give special consideration to Dr. Dandrea's opinion, however, as the record demonstrates that he has been the Claimant's treating

[11] Drs. Dandrea and Malhotra characterized the Claimant as totally disabled and found him unable to perform his usual coal mine work. Dr. Ignacio's clinic notes rated the Claimant's level of functioning at one point as markedly restricted; considering the exertional requirements of the Claimant's usual coal mine job, *see* footnote 10 *supra*, I find total disability can be inferred. Dr. Sabo apparently found the Claimant to suffer some degree of impairment as he attributed 90% of that impairment to chronic obstructive pulmonary disease with pneumoconiosis related to coal dust exposure and 10% of the impairment to chronic bronchitis secondary to cigarettes; again, considering the exertinoal requirements of the Claimant's usual coal mine employment disability can be inferred.

[12] Drs. Pickerill, Begley, Strother and Fino related any pulmonary disease to the Claimant's smoking history. The Claimant testified that he smoked on average a pack to a pack and a half of cigarettes a day from age 16 (1943) to 1967 (Tr. 15); he smoked one to two pipefuls a day from age 40 (1967) to age 59 (1986) (Tr. 19).

physician for over 20 years. As such, he has had the unique opportunity to observe the Claimant's condition over time; he has also had the benefit of Dr. Ignacio's opinion based on examination and tests performed at the coal workers' clinic over the years. At his deposition Dr. Dandrea was confronted with the opinion of the Claimant's pulmonary and radiological experts. He acknowledged the 0/1 x-ray readings, that the results of the Claimant's recent pulmonary function and exercise studies may not establish total disability, and defended the benefits of his prescription of breathing medication to the Claimant. Notwithstanding the experts opinions, it remained Dr. Dandrea's opinion based on his observation of the Claimant over the years that the Claimant is totally disabled by coal workers' pneumoconiosis and chronic obstructive pulmonary disease. I find the fact that the Claimant's treating physician considers him totally disabled to raise true doubt in face of the Employer's experts opinions. As stated above, true doubt is to be resolved in favor of the Claimant.

The Claimant has proved that he is totally disabled by pneumoconiosis.

Conclusion

The Claimant has proved: (1) the existence of pneumoconiosis; (2) that the disease arose from coal mine employment; and (3) that he is totally disabled as a result of the disease. The Claimant is entitled to benefits.

Attorney Fees

No award of attorney's fees for services to the Claimant is made herein because no application has been received from counsel. A period of 30 days is hereby

allowed for the Claimant's counsel to submit an application. The application must conform to 20 C.F.R. §§ 725.365 and 725.366, which set forth the criteria for consideration of the request. The application must be accompanied by a service sheet showing that service has been made on all parties, including the Claimant and Solicitor as counsel for the Director. Parties so served have 10 days following receipt to file their objections. Counsel is forbidden by law to charge the Claimant any fee in the absence of approval of such application.

ORDER

The Responsible Operator is hereby ordered to provide for payment:

1. To the Claimant of all benefits to which he is entitled commencing January 1, 1989,[13] augmented by his dependent wife Rose;

2. Pay or otherwise provide for all medical and hospitalization benefits to which the Claimant is entitled;

3. Pay to the Secretary of Labor reimbursement for any payment the Secretary has made to the Claimant on or after March 1, 1978, under the Act and deduct such amounts, as appropriate, from the amount the Employer is ordered to pay under paragraphs 1 and 2 above;

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[13] The Employer stated among its contested issues that the Claimant was receiving sickness and accident benefits from January 11, 1989 (Dir. Ex. 46). No evidence as to such benefits exists in the record. The Claimant ceased working as a miner on January 4, 1989 (Tr. 11). He stated that he receives no State Workers' Compensation benefits (Tr. 18). Finding no basis in the record for determining that the Claimant was on the Employer's payroll, after January 4, 1989, I find that he ceased employment on that date and set the date of entitlement to benefits accordingly.

4. Pay to the Claimant or to the Secretary of Labor, as appropriate, interest from 30 days after the initial determination of entitlement by the Department of Labor until the date upon which payment is actually paid. The rate of interest payable is that rate effective, pursuant to 20 U.S.C. § 1961(a), on the date this Decision and Order is filed by the Deputy Commissioner. *See Bethlehem Mines Corp. v. Director, OWCP,* 766 F.2d 128 (3d Cir. 1985).

/s/ Joan Huddy Rosenzweig

JOAN HUDDY ROSENZWEIG
Administrative Law Judge

JHR/KLB:mr

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this Decision by filing a notice of appeal with the Benefits Review Board, 1111 20th Street, N.W., Suite 757, Washington, D.C. 20036. *A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Francis Perkins Building, Room N-2605, 200 Constitution Avenue, N.W., Washington, D.C. 20210.*

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-3270

GREENWICH COLLIERIES, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND ANDREW ONDECKO, RESPONDENTS

[Filed June 25, 1993]

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and ROSENN,* *Circuit Judges*

The petition for rehearing filed by respondent Director, Office of Workers' Compensation Programs, United States Department of Labor, in the above captioned matter having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who

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* Hon. Max Rosenn, United States Circuit Judge, was limited to voting for panel rehearing.

concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

Judge Becker would grant rehearing.

By the Court,

/s/ William D. Hutchinson
Circuit Judge

DATED: June 25, 1993

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 92-3222

MAHER TERMINALS, INC., PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND PASQUALINA SANTORO, RESPONDENTS

[Filed June 25, 1993]

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and ROSENN,* *Circuit Judges*

The petition for rehearing filed by respondent Director, Office of Workers' Compensation Programs, United States Department of Labor, in the above captioned matter having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who

* Hon. Max Rosenn, United States Circuit Judge, was limited to voting for panel rehearing.

concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Becker would grant rehearing.

By the Court,

/s/ William D. Hutchinson

Circuit Judge

DATED: June 25, 1993

☆ U.S. GOVERNMENT PRINTING OFFICE: 1993—301-157/88049